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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WALTER ZANT, WARDEN,
Petitioner,

v.

ALPHA OTIS O'DANIEL STEPHENS,
Respondent.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HARRISON KOHLER
Assistant Attorney General
Counsel of Record for the Petitioner

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

HARRISON KOHLER
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3359

QUESTION PRESENTED

1.

When a death penalty is imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, is the death penalty to be set aside because one of these aggravating circumstances is set aside?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported as Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). (Appendix 1). The opinion of the Court of Appeals on

rehearing is not yet reported. See Stephens v. Zant, ___ F.2d ___ (5th Cir. 1981). (Appendix 64). The opinion of the District Court dismissing the writ of habeas corpus is an unreported decision. See Stephens v. Zant, 79-30-MAC (M.D. Ga. May 11, 1979). (Appendix 50).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered November 26, 1980. See Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). A timely petition for rehearing and rehearing en banc was filed, and that Court entered a judgment June 18, 1981. See Stephens v. Zant, ___ F.2d ___ (5th Cir. 1981). This petition for certiorari has been filed within the allowable ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution:

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . ."

28 U.S.C. § 2254(a):

> ". . . a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State Court only on the ground that he is in custody in violation of the Constitution of laws . . . of the United States."

STATEMENT OF THE CASE

Respondent Alpha Otis O'Daniel Stephens was tried January 20-21, 1975, in the Superior Court of Bleckley County, Georgia, for the murder of Roy Asbell, and the jury found him guilty. During the sentencing phase of the trial, Respondent's prior convictions for motor vehicle theft, six counts of burglary, three counts of armed robbery, kidnapping with bodily injury, and murder were introduced into evidence.

The jury found three aggravating circumstances and recommended the death penalty:

(1) Respondent had a prior record of conviction for a capital felony, see Ga. Code Ann. § 27-2534.1(b)(1);

(2) Respondent had a substantial history of serious assaultive convic-

tions, see Ga. Code Ann. § 27-2534.1(b)(1);

(3) Respondent was on escape when he committed the murder, see Ga. Code Ann. § 27-2534.1(b)(9).

After Respondent was tried but before his appeal was final, the Georgia Supreme Court held that the portion of Ga. Code Ann. § 27-2534.1(b)(1), which allows the death penalty where a murder is committed by a person with a substantial history of assaultive convictions, is unconstitutional. Arnold v. State, 236 Ga. 534, 542, 224 S.E.2d 386 (1976). Nevertheless, the Georgia Supreme Court upheld Respondent's death penalty because the evidence supported the jury's findings of the other two aggravating circumstances. Stephens v. State, 237 Ga. 259, 261-62, 227 S.E. 2d 261 (1976), cert. denied 429 U.S. 986 (1977).

On Respondent's State habeas appeal, the Georgia Supreme Court again held that the fact the jury was allowed to consider an aggravating circumstance later held to be unconstitutional did not require the vacating of the death penalty. Stephens v. Hopper, 241 Ga. 596, 603-04, 247 S.E. 2d 92 (1978), cert. denied 439 U.S. 991 (1978).

The District Court of the Middle District of Georgia denied federal habeas corpus relief. Stephens v. Zant, 79-30-MAC (M.D. Ga. May 11, 1979). However, the Fifth Circuit Court of Appeals vacated Respondent's death penalty on appeal. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980). Upon Warden Zant's timely petition for rehearing and rehearing en banc, that Court changed one paragraph of the prior opinion but the petition for rehearing and

rehearing en banc were denied. Stephens v. Zant, ___ F.2d ___ (5th Cir. 1981).

REASON FOR GRANTING THE WRIT

WHERE A DEATH PENALTY IS IMPOSED ON THE BASIS ON A PLURALITY OF AGGRAVATING CIRCUMSTANCES, EACH OF WHICH HAS BEEN ESTABLISHED BEYOND A REASONABLE DOUBT, THE DEATH PENALTY SHOULD NOT BE SET ASIDE BECAUSE ONE OF THESE AGGRAVATING CIRCUMSTANCES IS SET ASIDE.

This case presents a clear and direct conflict between the Fifth Circuit Court of Appeals and the Georgia Supreme Court, which should be resolved by this Court.

The law in Georgia is well-settled that if a death penalty is imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, the death penalty will not be set aside because one of these aggravating circum-

stances is set aside. Stevens v. State, ___ Ga. ___, ___ S.E.2d ___ (No. 36943 June 2, 1981); Hamilton v. State, 246 Ga. 264 n. 1, 271 S.E.2d 173 (1980), cert. denied ___ U.S. ___ (1981); Brooks v. State, 246 Ga. 262, 263, 271 S.E.2d 172 (1980), cert. denied ___ U.S. ___ (1981); Collins v. State, 246 Ga. 261, 262, 271 S.E.2d 352 (1980), cert. denied ___ U.S. ___ (1981); Burger v. State, 245 Ga. 458, 460-61, 265 S.E.2d 797 (1980), cert. denied 446 U.S. 988 (1980); Dampier v. State, 245 Ga. 427, 883 n. 1, 265 S.E.2d 565 (1980), cert. denied ___ U.S. ___ (1980); Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979), cert. denied 445 U.S. 938 (1980); Stephens v. Hopper, 241 Ga. 596, 603-04, 247 S.E.2d 92 (1978), cert. denied 439 U.S. 991 (1978); Stephens v. State, 237 Ga. 259, 261-62, 227 S.E.2d 261 (1976), cert. denied 429 U.S. 986 (1977).

"[T]he Georgia Supreme Court's position is clear, and . . . I consider it consistent with this Court's decisions." Westbrook v. Balkcom, ___ U.S. ___, 101 S.Ct. 541, 543, 66 L.Ed.2d 298 (1980) (J. Stevens concurring).

Georgia's death penalty statute was upheld in Gregg v. Georgia, 428 U.S. 153 (1976). This Court upheld Gregg's death penalty even though the jury had been allowed to impose a death penalty for armed robbery. Id. at 161-62. The Georgia Supreme Court had ruled that the death penalty for armed robbery was disproportionate, Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974); yet the fact the jury considered and imposed a death penalty for armed robbery did not require that the death penalty for murder be vacated.

In vacating Respondent's death penalty, the Fifth Circuit Court of Appeals relied primarily on the authority of Stromberg v. California, 283 U.S. 359 (1931); accord, Bachellar v. Maryland, 397 U.S. 564 (1970); Street v. New York, 394 U.S. 576 (1969); Yates v. United States, 354 U.S. 298 (1957). In Stromberg v. United States, supra, at 367-68, this Court noted that where there was a general verdict of guilty, which could have rested on three grounds, one of which was unconstitutional, it was impossible to tell on which ground the verdict rested and the conviction had to be set aside. Bachellar v. Maryland, supra; Street v. New York, supra; and Yates v. United States, supra, all involved general verdicts of guilty, each of which could have been based on an unconstitutional ground.

The penalty verdict at Respondent's trial was not a general verdict, and the jury found two aggravating circumstances. The Court of Appeals admitted that there was "no uncertainty" as to the two valid aggravating circumstances and either circumstance "by itself would be legally sufficient to permit the jury to impose the death penalty." Stephens v. Zant, 631 F.2d 397, 406 (5th Cir. 1980).

Originally the Court of Appeals held that "[t]he presence of the unconstitutionally vague aggravating circumstance made it possible for the jury to consider several prior convictions of . . . [Respondent] which otherwise would not have been before it." Id. Warden Zant pointed out that this was an incorrect statement of Georgia law, as all of the accused's prior convictions are admissible

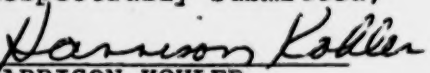
during the sentencing phase of the trial. Hughes v. State, 239 Ga. 393, 397-98, 236 S.E.2d 829 (1977). The Court of Appeals modified the holding but denied the petition for rehearing and rehearing en banc. Stephens v. Zant, ___ F.2d ___ (5th Cir. 1981).

The decision of the Court of Appeals conflicts with well-settled law of the Georgia Supreme Court, with this Court's actions in denying petitions for writs of certiorari from the Georgia Supreme Court, and with this Court's reasoning in Gregg v. Georgia, 428 U.S. 153, 161-62 (1976).

CONCLUSION

For all the previously stated reasons, a petition for writ of certiorari should be granted by this Court.

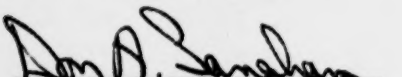
Respectfully submitted,



HARRISON KOHLER
Assistant Attorney General
Counsel of Record for Petitioner

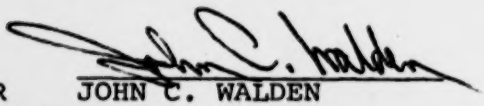
ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant Attorney General



DON A. LANGHAM
First Assistant Attorney General

Please serve:



JOHN C. WALDEN
Senior Assistant Attorney General

HARRISON KOHLER
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3359

CERTIFICATE OF SERVICE

I, Harrison Kohler, Attorney of Record for the Petitioner and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of this Petition for Writ of Certiorari upon the Respondent by depositing this petition in the United States Mail with sufficient, first-class postage affixed and addressed to counsel for Respondent as follows:

Mr. James C. Bonner, Jr.
Prisoner Legal Counseling
Project
475 North Lumpkin Street
Athens, Georgia 30601

Mr. John Charles Boger
NAACP Legal Defense and
Education Fund
10 Columbus Circle
New York, New York 10019

(Cont.)

This 14th day of July, 1981.

Harrison Kohler

HARRISON KOHLER
Assistant Attorney General
Counsel of Record for Petitioner

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APPENDIX

ALPHA OTIS O'DANIEL STEPHENS,

Petitioner-Appellant,

v.

WALTER ZANT, SUPERINTENDENT,

Respondent-Appellee.

No. 79-2407.

United States Court of Appeals
Fifth Circuit.

Nov. 26, 1980.

Appeal from the United States District Court for the Middle District of Georgia.

Before INGRAHAM, RONEY, and THOMAS A. CLARK, Circuit Judges.

RONEY, Circuit Judge.

Petitioner, convicted of murder and sentenced to death by the State of Georgia, appeals from a denial of a writ of habeas corpus. Petitioner contends his conviction violates the Double Jeopardy Clause

and his sentence is invalid under the Eighth Amendment because closing arguments were not transcribed, the jury was not properly instructed that it could recommend a life sentence if it found aggravating circumstances, and the jury was permitted to consider an unconstitutional aggravating circumstance. Although we reject his other contentions, we agree that because the jury considered an unconstitutional aggravating circumstance, petitioner's death sentence cannot stand.

In August of 1974, petitioner escaped from jail where he was serving sentences for earlier burglary convictions. He committed a number of crimes in Twiggs County, Georgia. While petitioner and an accomplice were burglarizing a house, Roy Asbell drove up in his car. Petitioner forced Asbell at gunpoint from the car,

hit him several times in the face and took a large sum of money from him. Petitioner then forced Asbell back into the car and drove him approximately three miles, across the county line into Bleckley County. There, petitioner killed Asbell by shooting him twice in the head at close range.

Shortly thereafter petitioner was apprehended and was indicted by the Twiggs County grand jury for motor vehicle theft, armed robbery and kidnapping with bodily injury. Petitioner pleaded guilty in Twiggs Superior Court and was sentenced to ten years for motor vehicle theft and to life sentences for armed robbery and kidnapping.

Afterwards petitioner was indicted in Bleckley County for the murder of Roy Asbell, found guilty and sentenced to

death. His conviction and sentence were affirmed on direct appeal to the Georgia Supreme Court. Stephens v. State, 237 Ga. 259, 227 S.E.2d 261, cert. denied, 429 U.S. 986, 97 S.Ct. 508, 50 L.Ed.2d 598 (1976). His state petition for a writ of habeas corpus was denied. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S.Ct. 593, 58 L.Ed.2d 667 (1978). Petitioner then sought a writ of habeas corpus in federal court, alleging the same constitutional flaws as were raised in state court. The district court denied relief. Petitioner appeals, his execution having been stayed pending appeal.

Petitioner asserts four errors in his conviction and sentence: (1) jeopardy for the murder charge attached when he pleaded guilty to the kidnapping charge and therefore his subsequent murder trial

was constitutionally barred; (2) the court failed to transcribe closing arguments and voir dire; (3) the instruction to the jury did not adequately charge that they could still impose life imprisonment even if they found aggravating circumstances that would justify the death sentence; and (4) when one of the three aggravating circumstances found by the jury was later declared unconstitutionally vague, the sentence should not have been affirmed on the basis of the other two.

I. DOUBLE JEOPARDY

The Twiggs County indictment for kidnapping recited that he killed the kidnap victim. The third count reads as follows:

COUNT III

And the aforesaid Grand Jurors... charge and accuse Alpha Otis O'

Daniel Stephens...with the offense of KIDNAPPING for that the said Alpha Otis O'Daniel Stephens... in the county aforesaid...did unlawfully and with force and arms abduct and steal away Roy Asbell, a person, without lawful authority, and held Roy Asbell against his will and did physically abuse and did inflict and cause bodily injury to the body of Roy Asbell by beating, hitting and kicking Roy Asbell and did threaten to kill Roy Asbell and then did kill Roy Asbell by shooting Roy Asbell, contrary to the laws of said State...

Petitioner argues that by stating that in the course of the kidnapping he killed Asbell, the State unwittingly

accused him of the crime of murder because the indictment alleged all the elementsof murder. When he pled guilty under Count III of the Twiggs indictment, he admitted every fact averred in the indictment. At that point, his argument continues, he ran the risk - i.e., was placed in jeopardy - of a conviction of murder under a felony - murder theory. Since under Georgia law felony murder and malice murder are different ways in which one offense may be committed, Leutner v. State, 235 Ga. 77, 218 S.E.2d 820 (1975), he argues the State was barred by the Double Jeopardy Clause from prosecuting him for malice murder in Bleckley County.

The Supreme Court of Georgia responded to petitioner's argument by holding that malice murder and kidnapping are not the same in law or in

fact and thus are not the same offense under state law. It also determined that the state legislature intended, under the test in Ga. Code Ann. §§ 26-505 to 507, to permit multiple prosecutions and punishments in a case such as this. Stephens v. Hopper, 241 Ga. at 598-600, 247 S.E.2d at 94-95. Cf. Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) (holding that the Double Jeopardy Clause prohibits courts from imposing greater penalties than the legislature intended).

While this is the definitive interpretation of Georgia law and binding upon this Court, Mullaney v. Wilbur, 421 U.S. 684, 691, 95 S.Ct. 1881, 1885, 44 L.Ed.2d 508 (1975), the holding does not adequately respond to petitioner's argument. Petitioner's contention is not that kid-

napping and malice murder are the "same offense." Rather, he asserts that felony murder was charged in the indictment, that by pleading guilty he was placed in jeopardy of conviction for that crime and therefore the state is barred from any further attempt to prosecute him for murder.

[1,2] Petitioner's contention that he was placed in jeopardy of a conviction for murder in Twiggs County is erroneous, because there was no jurisdiction in that county to try him for the homicide. The rule is absolute that a person is not put in jeopardy unless the court in which he was tried the first time had jurisdiction to try him for the charge the person now seeks to avoid. The Supreme Court has twice spoken to the point.

We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged.

Graftonv. United States, 206 U.S. 333, 345, 27 S.Ct. 749, 751, 51 L.Ed. 1084 (1907).

> An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense.

United States v. Ball, 163 U.S. 662, 669, 16 S.Ct. 1192, 1194, 41 L.Ed. 300 (1896).

The Georgia Constitution requires that, unless an impartial jury cannot be obtained, "all criminal cases shall be tried in the county where the crime was committed." Ga. Const. Art. VI, § XIV, ¶ VI (Ga. Code Ann. § 2-4306). The Supreme Court of Georgia specifically held in this case that the Twiggs County court did not have jurisdiction to try the murder offense. Stephens v. Hopper, 241 Ga. at 599, 247 S.E.2d at 95. The Fifth Circuit held in Tennon v. Ricketts, 574 F.2d 1243, 1245 (1978), cert. denied, 439 U.S. 1091, 99 S.Ct. 874, 59 L.Ed.2d 57 (1979), that "it is for the Georgia Supreme Court, not this Court, to expound the decisional rules of that, jurisdiction." Accord, Hortonville Joint School District No. 1 v. Hortonville Education Assn., 426 U.S. 482, 488, 96 S.Ct. 2308, 2312, 49 L.Ed.2d 1 (1976); Mullaney v. Wilbur, 421 U.S.

684, 691, 95 S.Ct. 1881, 1885, 44 L.Ed.2d 508 (1975); Eisenstadt v. Baird, 405 U.S. 438, 441-42, 92 S.Ct. 1029, 1032, 31 L.Ed.2d 349 (1972) (all holding that the highest state court is the final authority on questions of state law and federal courts are bound to accept its interpretation of state law).

[3] The question of the jurisdiction of a state trial court in a state criminal prosecution is clearly a question of state law, which binds this Court. Since the Twiggs Superior Court had no jurisdiction to hear the murder offense, petitioner was not placed in jeopardy of a murder conviction, under either a malice murder or felony murder theory, in the Twiggs County proceedings.

[4] Petitioner was, however, placed in jeopardy for the offense of

kidnapping with bodily injury. The Double Jeopardy Clause bars a subsequent prosecution for any offense deemed the "same offense" under the test in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932).

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

The Supreme Court held in Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), that a lesser or greater included offense is the "same offense" for double jeopardy purposes. It thus

becomes necessary to determine whether petitioner's murder conviction was for the "same offense" as his kidnapping charge.

[5] Malice murder and kidnapping with bodily injury have separate and distinct elements and require proof of different facts. Kidnapping consists of abducting another unlawfully and against his will, plus inflicting some bodily injury. Malice murder consists of killing another with malice aforethought. Thus, even if they involve the same transaction and considerably overlap each other factually, they are not the "same offense" under Blockburger. In addition, as found by the Georgia Supreme Court, the Georgia legislature intended multiple punishment for kidnapping and malice murder in a case such as this. Stephens

v. Hopper, 241 Ga. at 599-600, 247 S.E.2d at 95-96.

[6,7] As felony murder is defined under Georgia law, the underlying factor is a lesser included offense of felony murder and thus the same offense under Blockburger. See Young v. State, 238 Ga. 548, 233 S.E.2d 750 (1977); Reed v. State, 238 Ga. 457, 233 S.E.2d 369 (1977). Once the State tried and convicted petitioner for kidnapping, it would be barred from prosecuting him for felony murder only if the underlying felony upon which that prosecution was based were that same kidnapping. Illinois v. Vitale, ___ U.S. ___, 100 S.Ct. 2260, 65 L.Ed.2d ___. See Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715; Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977).

[8] We have examined the record closely to see whether the Bleckley County murder prosecution was based in any part on a theory of felony murder with the underlying felony being the kidnapping of Roy Asbell. The record clearly shows that petitioner was indicted, tried and convicted solely on the grounds that he committed murder with malice aforethought. The trial judge specifically instructed the jury on the requirement of malice.

> I further charge you that on the trial of a defendant for the offense of Murder the burden is on the State to prove malice, either expressed or implied, and unless the State proves malice beyond a reasonable doubt there can be no verdict of guilty of Murder, and you should acquit of that charge. For as I said, there can be no Murder without malice.

Where, as here, it is clear petitioner was tried and convicted for malice murder and that crime was not the "same offense" as the kidnapping with bodily injury for which he was convicted in the first proceeding, the Double Jeopardy Clause does not bar the malice murder conviction regardless of whether malice murder and felony murder are the "same offense" under the Blockburger test. Petitioner's double jeopardy argument is accordingly rejected.

II. INCOMPLETE TRANSCRIPT

The transcript in petitioner's murder trial does not include the closing and sentencing arguments of counsel or the voir dire of the jury. It appears that the entire trial was recorded by the court reporter. The customary practice in that court, however, was that voir dire and closing arguments were not transcribed

in the absence of a request by the State or the defendant. Both of petitioner's attorneys were familiar with that practice but neither they nor the State requested that those portions of the trial be transcribed. Trial counsel were also informed by the trial judge that if they had any objections to the arguments, the objectionable portion of the argument and the objection would be transcribed. No objections were made. Thus, no part of closing arguments was transcribed.

At the time of petitioner's initial appeal to the Supreme Court of Georgia, the trial judge submitted as part of the record on appeal the detailed, seven-page questionnaire required by Ga. Code Ann. § 27-2537(a) and described in Gregg v. Georgia, 428 U.S. 153, 211-12, 96 S.Ct. 2909, 2942-43, 49 L.Ed.2d 859 (1976) (White, J., concurring). That ques-

tionnaire provided a comprehensive summary of the trial and a profile of the defendant.

An affidavit of the trial judge was received at the habeas corpus hearing in state court. In that affidavit the trial judge made the following statement.

> In his closing argument, [the district attorney] factually summarized the evidence in the case. He made no allusions to race nor did he use any epithet in referring to Stephens. I recall no statement by [the district attorney] that was inflammatory or that injected passion or prejudice into the trial of Stephens.

Petitioner has not alleged that anything erroneous, inflammatory or

prejudicial occurred in the untranscribed portion of the trial. As he stated in his brief, there is nothing to indicate that there was anything of special importance in that part of the trial. His contention, simply stated, is that a death sentence cannot constitutionally be affirmed when the transcript before the reviewing court does not contain the proceedings of the entire trial.

Petitioner relies principally on Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1976). In Gardner, the defendant was convicted of first degree murder and the jury recommended a life sentence. The trial judge did not accept the advisory verdict of the jury, but instead, on the basis of a presentence report, imposed the death penalty. The confidential portion of the presentence report was shown neither

to counsel nor to the defendant, and neither requested to see it. The judge did not state on the record the substance of the material contained in the report. The report was also omitted from the record on appeal. The plurality opinion of Justice Stevens, joined by two other justices, found that this procedure violated the Due Process Clause and vacated the sentence.

[9,10] Gardner does not establish the per se rule that petitioner attributes to it. The decisive test is the one suggested by the plurality's statement that the procedure on appeal should be "[ ] consistent with the basis upon which the [state's] capital-sentencing procedure was upheld." Id. at 360 n. 11, 97 S.Ct. at 1205. This Court must examine Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909,

49 L.Ed.2d 859, to determine the basis upon which Georgia's capital-sentencing procedure was upheld and thereby identify the function the Georgia Supreme Court's review is to play in that procedure. If the record presented to the Georgia Supreme Court was so deficient that it would be impossible for that court to perform the function required of it under Gregg, or would create "a substantial risk" that the penalty is being inflicted in an arbitrary and capricious manner, id. at 188, 96 S.Ct. at 2932, petitioner's sentence cannot be permitted to stand. This analysis is especially appropriate where, as here, the case was tried and appealed before the decision in Gregg.

In discussing the automatic appeal of death-sentence cases to the Georgia Supreme Court, the Gregg plurality identified the role of that court in

reviewing death sentences.

> That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.

Id. at 198, 96 S.Ct. at 2936.

Several considerations convince us that the record on appeal to the Georgia Supreme Court was adequate to permit that court to make the determininations required of it under Gregg. For the reasons set out below, we hold that Gardner is not controlling here and that petitioner's

sentence should not be overturned on this ground. First, the report in Gardner was clearly the key element in the decision to impose the death penalty, for it contained "the factual basis for the judge's rejection of the advisory verdict." 430 U.S. at 362, 97 S.Ct. at 1206. Without it, it was impossible for the state supreme court to determine whether the state was "administer[ing] its capital-sentencing procedures with an even hand." Id. at 361, 97 S.Ct. at 1206. In this case, however, the bases for the imposition of the death penalty are set forth in the record, and the record is more than adequate to permit the state court to determine whether the death penalty was imposed with an even hand.

Second, the plurality in Gardner was obviously distrubed by defense counsel's

lack of opportunity to comment on and object to the portion or the report not in the record, and to challenge the accuracy or materiality of the information it contained. Honest and robust debate between adversaries is essential in foreclosing the possibility, in both fact and appearance, for the intrusion of caprice, emotion, and other arbitrary influences in the truth-seeking process. In the absence of such debate, it may be difficult to achieve accuracy and avoid the appearance of arbitrariness. In the present case, all proceedings took place in open court and all counsel had a full opportunity to comment on and challenge those proceedings. The appearance of arbitrariness is thus not a factor here as it was in Gardner.

Third, unlike in Gardner, there is affirmative evidence here that the con-

viction and sentence were based on the evidence presented and transcribed. The State has come forward with affirmative and uncontroverted proof that in the untranscribed arguments the district attorney merely factually summarized the evidence in the case. In addition, the jurors were twice instructed to base their decision on the facts and inferences presented in the evidence. The failure of petitioner's attorneys to make any objection to the argument must also be seen as further evidence that there was no injection of anything prejudicial to petitioner and that the jury received the case solely on the basis of the evidence.

Fourth, the Georgia Supreme Court had before it in this case the detailed report of the trial judge on the defendant and the trial. At least three jus-

tices in Gregg felt the presence of this report was a significant factor in the state supreme court's review function.

> An important aspect of the new Georgia legislative scheme, however, is its provision for appellate review. Prompt review by the Georgia Supreme Court is provided for in every case in which the death penalty is imposed. To assist it in deciding whether to sustain the death penalty, the Georgia Supreme Court is supplied, in every case, with a report from the trial judge in the form of a standard questionnaire. . . . The questionnaire contains, inter alia, six questions designed to disclose whether race played a role in the

> case and one question asking the trial judge whether the evidence forecloses "all doubt respecting the defendant's guilt."

Id. at 211-12, 96 S.Ct. at 2942-43 (opinion of White, J., joined by Burger, C. J. and Rehnquist, J.). No such report was available to the state supreme court in Gardner.

Fifth, as noted above, petitioner has neither alleged nor offered any evidence that he was actually prejudiced by anything said in the untranscribed portion of the trial or by the failure to make the transcription. Both petitioner and one of his trial attorneys were present at the habeas corpus hearing in the Superior Court and neither suggested anything that was harmful, erroneous, inflam-

matory, or prejudicial. See Clayton v. Blackburn, 578 F.2d 117 (5th Cir. 1978).

[11] The presence of these factors persuades us that the record as a whole adequately meets "the need for reliability in the determination that death is the appropriate punishment in [this] specific case," Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (opinion of Stewart, Powell and Stevens, JJ.), and that the capital-sentencing procedures have been administered with an even hand. See Gardner v. Florida, 430 U.S. at 361, 97 S.Ct. at 1206; Proffitt v. Florida, 428 U.S. 242, 250-53, 96 S.Ct. 2960, 2965-67, 49 L.Ed.2d 913 (1976) (opinion of Stewart, Powell and Stevens, JJ.). The state of the record reviewed by the Georgia Supreme Court was adequate to permit it to complete the review functions required of that court

under Gregg and to ensure that there was no substantial risk that the death sentence was arbitrarily imposed. Accordingly, we hold that in this case the failure to transcribe counsel's arguments is not a constitutional violation requiring petitioner's sentence to be vacated.

Our holding should not be construed to suggest that we condone the failure of the trial court to transcribe the entire proceedings in a death penalty case. We note that the Supreme Court of Georgia has directed that the argument of counsel should henceforth be transcribed in all cases in which the death penalty is sought. Stephens v. Hopper, 241 Ga. at 600, 247 S.E.2d at 95.

[12] The question whether voir dire was properly conducted was considered by the Supreme Court of Georgia on

direct appeal. Stephens v. State, 237 Ga. 259, 227 S.E.2d 261. That court ordered the trial record to be supplemented. From the extensive notes he made during the trial, the judge filed a five-page supplement to the record on the voir dire issue, and that supplement was acknowledged by counsel. The detailed supplement clearly presented to the Supreme Court of Georgia the opportunity to consider any possible error or any injection of arbitrariness. Petitioner shows no prejudice from the failure to transcribe voir dire.

[13] The supplement also shows that the only potential juror expressing conscientious objection to the death penalty was struck by the State using one of its peremptory challenges. There is thus no Witherspoon issue in this appeal. See

Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

III. IMPROPER JURY INSTRUCTION

Petitioner contends that, while the jury was instructed in the sentencing phase of the trial that it must find at least one statutory aggravating circumstance before it could impose a death sentence, it was not instructed that even if it found such a circumstance it need not impose death.

[14] When an appellate court reviews the adequacy of an instruction to the jury, it must view the charge as a whole. Cupp v. Naughten, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973); United States v. Brooks, 611 F.2d 614, 619 (5th Cir. 1980). Only when the charge

taken in its entirety fails to fairly present the issues to the jury will error be found. United States v. Chandler, 586 F.2d 593, 606 (5th Cir. 1978), cert. denied, 440 U.S. 927, 99 S.Ct. 1262, 59 L.Ed.2d 483 (1979).

[15] In his charge to the jury, the trial judge instructed them that they were to consider all the evidence of the case, including evidence of mitigation and aggravation. He told the jury that unless one of the statutory aggravating circumstances was found to be proven beyond a reasonable doubt, they would not be authorized to impose a death penalty. He then specified which aggravating circumstances they could consider. He told them that if they wished to recommend mercy, they did not have to recite any mitigating or aggravating circumstances they might find. He concluded by instructing them

how to fill out the forms.

Considering the charge as a whole, it is clear that the issue was fairly presented to the jury. The clear implication of the charge is that the jury could recommend mercy without stating what mitigating or aggravating circumstances could be present and yet the jury could still be free to impose life imprisonment. Petitioner's contention is rejected.

IV. AGGRAVATING CIRCUMSTANCES

The trial judge permitted the jury to consider four statutory aggravating circumstances: (1) the offense was committed by one who had escaped from lawful custody, Ga. Code Ann. § 27-2534.1(b)(9); (2) the offense was committed by one having a prior conviction for a capital felony,

id. § 27-2534.1(b)(1); (3) the offense was committed by one having a substantial history of serious assaultive criminal convictions, id.; or (4) the offense was outrageously or wantonly vile, horrible or inhuman, id. § 27-2534.1(b)(7). The jury found the first three to be present but not the fourth.

Following trial and before petitioner's case was reviewed by the Supreme Court of Georgia, that court declared aggravating circumstance (3), commission by one having a substantial history of serious assaultive criminal convictions, to be unconstitutionally vague. Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976). After eliminating that circumstance from consideration of petitioner's appeal, the Georgia court in this case found the evidence supported the jury's findings of the other statutory aggravating circum-

stances and held that the sentence was not impaired. Stephens v. State, 237 Ga. at 261-62, 227 S.E.2d at 263.

In his state habeas corpus petition, petitioner contended that aggravating circumstance (2), commission by one having a prior conviction for a capital felony, was also invalid because he was under no such conviction at the time the crime was committed although he was admittedly under conviction for a capital felony at the time of his murder trial. The Supreme Court of Georgia interpreted the statute, Ga. Code Ann. § 27-2534.1(b)(1), as requiring that the jury should consider his record as of the time of sentencing. Accordingly, petitioner's contention was rejected. Stephens v. Hopper, 241 Ga. at 602-03, 247 S.E.2d at 96-97.

[16] On appeal to this Court, petitioner argues that the presence of unconstitutional aggravating circumstance (3) before the jury and the questionable interpretation of aggravating circumstance (2) create such potential for the intrusion of arbitrary influences into his sentence as to violate his constitutional rights and require his sentence to be vacated. The Supreme Court of Georgia is the ultimate authority on the law of Georgia and we are not permitted to question its interpretation of that State's statutes. Tennon v. Ricketts, 574 F.2d at 1245. We must therefore treat circumstance (2) as it is interpreted by the Georgia Supreme Court.

The question presented, then is wehther the death penalty was invalid under the Constitution because it was

imposed when one of the aggravating circumstances was later held to be unconstitutional even though there were two other aggravating circumstances, either of which by itself would be legally sufficient to permit the jury to impose the death penalty and as to both of which there is no uncertainty.

In Stromberg v. California, 283 U.S. 359, 367-68, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931), the Supreme Court held that if the jury has been instructed to consider several grounds for conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside. Accord, Bachellar v. Maryland, 397 U.S. 564, 570-71, 90 S.Ct. 1312, 1315-16, 25 L.Ed.2d 570 (1970); Street

v. New York, 394 U.S. 576, 585-88, 89 S.Ct. 1354, 1362-63, 22 L.Ed.2d 572 (1969); Yates v. United States, 354 U.S. 298, 311-12, 77 S.Ct. 1064, 1072-73, 1 L.Ed.2d 1356 (1957). This settled principle of law applies with particular force in cases in which the death penalty has been imposed. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), held that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner. The Constitution requires that the sentencer's discretion be channeled by clear and objective standards that "make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, 428 U.S. at 303, 96 S.Ct. at 2990 (opinion of Stewart, Powell and Stevens, JJ.).

It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance. The jury had the authority to return a life sentence even if it found statutory aggravating circumstances. It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the decision that the offense was committed by one having a substantial history of serious assaultive criminal convictions, an invalid ground. The presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of petitioner which otherwise would not have been before it. The instruction on the invalid circumstance

may have directed the jury's attention to those convictions. It cannot be determined with the degree of certainty required in capital cases that the evidence of those convictions, together with the instruction, did not make a critical difference in the jury's decision to impose the death penalty.

[17] We hold that the jury's discretion here was not sufficiently channeled, see Godfrey v. Georgia, ___ U.S. ___, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and that the process in which the death penalty was imposed in this case was not "rationally reviewable." Woodson v. North Carolina, 428 U.S. at 303, 96 S.Ct. at 2990. See also Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393. Petitioner's death sentence therefore cannot stand.

V. OTHER CONSIDERATIONS

In the brief filed by amicus curiae, NAACP Legal Defense and Educational Fund, the Court's attention is invited to three additional issues: (1) whether the trial judge should have ordered a competency hearing in light of petitioner's conduct at trial; (2) whether petitioner was denied effective assistance of counsel because of counsel's inability to communicate with him; and (3) whether petitioner's uncounseled confession was knowing and voluntary, in view of allegations that it was given while appellant was under the influence of drugs. These issues may relate to petitioner's murder conviction, but they were not considered by the district court. On remand, that court should take whatever action is appropriate with respect to those issues.

We reverse the district court's denial of habeas corpus relief insofar as it leaves standing the petitioner's death sentence, and the case is remanded for further proceedings.

REVERSED AND REMANDED.

THOMAS A CLARK, Circuit Judge, concurring in part and dissenting in part:

I concur in the relief grnated and all of the opinion except Part I which holds that there is no double jeopardy. It is my view that Stephens was placed in jeopardy for the offense of killing Asbell in Twiggs County under the holding of Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (Ga.Sup.Ct.1978). In that case the court decided, under facts virtually identical to those in this case, that Potts could receive two death penalties, one in Cobb County for the kidnapping with bodily

injury of Priest and one in Forsyth County for the murder of Priest. In refuting Stephens' double jeopardy contention, the Georgia Supreme Court relied specifically on its holding in Potts. [1]

If Stephens had been tried in Twiggs County he could have received the death sentence in that county as well as in Bleckley County, where he was given the death sentence which is the subject of this appeal. The only difficulty Stephens has in asserting the bar of his prior conviction to the subsequent prosecution, however, is in the venue provisions of Georgia law, which purport to vest jurisdiction for criminal homicides in the county where the cause of death was inflicted. The majority concludes that

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1. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92, at 95 (1978).

these provisions, as construed by the Georgia courts, divested the Twiggs County court of jurisdiction over the offense for which he was later tried, and which Georgia law required to be tried only in Bleckley County. I do not agree.

It is clear that Stephens could have received the death penalty in Twiggs County for the offense to which he there plead guilty, the kidnapping-with-bodily-injury-resulting-in-death of Roy Asbell. Potts, supra, says so. It is equally clear that Stephens could not have received the death penalty for any offense, however Georgia defines that offense and wherever Georgia requires that offense to be tried, absent proof that the victim was killed in the commission of the crime. As I understand Georgia law, that state does not now impose the death penalty for any offense

not resulting in the death of the victim.[2] Since Georgia law does not recognize any

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2. Stanley v. State, 240 Ga. 341, 241 S.E.2d 173, 179-80 (1977). If a death penalty in Twiggs County could be said to be based solely on kidnapping with bodily injury not resulting in death, I think the penalty, as affirmed in Potts, would be unconstitutional under Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), and Eberheart v. Georgia, 433 U.S. 917, 97 S.Ct. 2994, 53 L.Ed.2d 1104 (1977), the latter of which set aside a death penalty for kidnapping with bodily injury as cruel and unusual punishment. A reading of the lower court opinion in Eberheart, 232 Ga. 247, 206 S.E.2d 12 (1974), does not make clear that he was charged with kidnapping with bodily injury, although there was a kidnapping and bodily injury. However, Justice Undercofler wrote the lower court opinion in Eberheart as well as the opinion in Collins v. State, 239 Ga. 400, 236 S.E.2d 759 (1977), where at 761, in referring to Eberheart, he recited that that earlier case had involved: "two death sentences for rape and kidnapping with bodily injury."

jurisdictional limitations on a court's power to punish as homicide a crime Georgia law does not call homicide, I do not feel any similar limitation on my duty to inquire whether the offenses are, within the meaning of the Constitution, the "same offense."

If Stephens could have received the death penalty under his Twiggs County indictment, as Potts clearly held that he could, it could only have been upon proof of the killing of the victim. Likewise, his subsequent prosecution for murder, under any theory of either malice or felony murder, would require proof that the victim was killed. [3]

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3. In this respect it is immaterial that Stephens recieved only a life sentence for that part of the kidnapping that occurred in Twiggs County, a punishment that might

That death, by whatever name called, is the greater, greatest, and ultimate offense. And that single offense cannot be the basis for several offenses that would permit the state to seek a separate death penalty for malice murder, felony murder, kidnapping with bodily injury murder, ad infinitum. Such reasoning tortures the

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3. (Cont.)
constitutionally attach to what happened in Twiggs County, taking no account of the killing that followed in Bleckley County. See note 2, supra. The fact remains that it was within the power of the Twiggs County court to punish for the Blackley killing, with a sanction reserved exclusively for killing. Jeopardy had attached, therefore, for the Bleckley County homicide when Stephens was brought to answer for that act in Twiggs County. The state needn't have more than one opportunity to punish for that killing, and the double jeopardy guaranty should prevent it.

meaning of "same offense" and the intent of forbidding the placing of a person twice in jeopardy for that same offense.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

ALPHA OTIS O'DANIEL STEPHENS,	:	
Petitioner,	:	
v.	:	CIVIL ACTION NO. 79-30-MAC
SUPERINTENDENT WALTER ZANT, Georgia Diagnostic and Classification Center,	:	
Respondent.	:	

JUDGMENT

Pursuant to the Ruling of this Court dated and filed May 11, 1979, and for the reasons stated therein, the petition for a writ of habeas corpus is denied.

This 11th day of May, 1979.

WALTER F. DOYLE, Clerk

By: S/Helen F. Newberry
Helen F. Newberry
Deputy Clerk

Filed 10:00 a.m.,
May 11, 1979

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

ALPHA OTIS O'DANIEL STEPHENS,	:	
Petitioner,	:	
v.	:	CIVIL ACTION NO. 79-30-MAC
SUPERINTENDENT WALTER ZANT, Georgia Diagnostic & Classification Center,	:	
Respondent.	:	

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner Alpha Otis O'Daniel Stephens, a state prisoner under the death sentence for murder, seeks habeas corpus relief pursuant to 28 U.S.C.A. § 2254. Stephens was convicted and sentenced to death by the Bleckley County Superior Court and the verdict and sentence was affirmed by the Georgia Supreme Court.

Stephens v. State, 237 Ga. 259, 227 S.E.2d 261 (1976), cert. denied 429 U.S. 986, 97 S.Ct. 508, 50 L.Ed.2d 599 (1976). A prior state petition for habeas corpus was denied by the Tattnall County Superior Court, Stephens v. Hopper, No. 77-94 (Dec. 14, 1977), and this denial of relief was likewise affirmed by the Georgia Supreme Court. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92 (1978), cert. denied.

On February 8, 1979 this court stayed the impending execution so that this petition might be heard and decided. The petitioner alleges as grounds for relief that (1) the murder conviction is violative of the double jeopardy clause of the Fifth Amendment, (2) the closing arguments of the district attorney which allegedly contained prejudicial remarks was not transcribed; and (3) the imposition of the death penalty is violative of the peti-

tioner's Eighth and Fourteenth Amendment rights. All these grounds have been presented to the state tribunals; consequently exhaustion of state remedies is not an issue.

The circumstance which lead to petitioner's murder conviction began on August 19, 1974 when Stephens escaped from the Houston County jail where he was being held on other escape charges. He stole a car and went to Macon, Georgia where he stole another car and committed a burglary. On August 21, 1974 he went to the residence of Charles Asbell in Twiggs County and began burglarizing the house. Among the items he took was a .357 magnum pistol. As Stephens and his accomplice were burglarizing the home, Charles Asbell's father, Roy Asbell, drove up and asked the two men what they were doing. The petitioner, armed with the

pistol, assaulted Asbell by hitting and kicking him and took a large sum of money from him. The petitioner forced Asbell into his vehicle and drove him a short distance across the county line into Bleckley County where Stephens shot Asbell twice in the head, killing him. The petitioner drove Asbell's vehicle to Savannah and the next day was apprehended by Savannah police on other charges. He later confessed to a number of burglaries as well as the kidnapping and murder of Roy Asbell.

On October 14, 1974 the petitioner was indicted by the Twiggs County grand jury for the armed robbery and kidnapping-with-bodily-injury of Roy Asbell, as well as various burglary charges and the murder of one Louise Mercer. Among the assaultive acts alleged in connection

with the kidnapping-with-bodily-harm charge was that Stephens shot and killed the victim. The petitioner pled guilty to all offenses and was sentenced to three consecutive life sentences as well as various other terms. In November, Stephens was indicted by the Bleckley County grand jury for the murder of Roy Asbell. Following a plea of not guilty he was tried, convicted and sentenced. The death sentence was imposed after the jury found that the murder was committed by a person with a prior conviction for a capital felony, by a person with a prior history of serious assaultive criminal convictions and by a person who had escaped from the lawful custody of a peace officer and place of lawful confinement. Ga. Code Ann. § 27-2534.1(b). The Georgia Supreme Court set aside the death penalty on account of prior assaultive

convictions but otherwise affirmed the conviction and death sentence. Stephens v. State, supra.

I. FORMER JEOPARDY

The petitioner argues that his guilty plea to kidnapping-with-bodily-harm (Ga. Code Ann. § 26-1311) in Twiggs County is a bar to prosecution for murder in Bleckley County on the grounds that the kidnapping and murder charges arose from the same acts and the homicide of Asbell was one of the acts of bodily harm in the kidnapping indictment. The Georgia Supreme Court rejected this argument reasoning that there was no procedural bar to the murder prosecution since Stephens could not be tried in Twiggs County for a murder that took place in Bleckley County. The court also held that there was no substantive bar to the prosecution because kid-

napping-with-bodily-injury and murder are not included offenses and are established by the proof of different facts. Stephens v. Hopper, supra. This court defers to the Georgia Supreme Court's decision insofar as it rests on a construction of state law; however, this court must decide the question measured against the Fifth Amendment's double jeopardy prohibition.

The double jeopardy clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This clause has been incorporated into the due process clause of the Fourteenth Amendment and constitutes a limitation on the states' power. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). As explained by the United States Supreme Court:

". . . where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."

Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306, 309 (1932). See also Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), United States v. Smith, 574 F.2d 308 (5th Cir. 1978).

This court is convinced that the double jeopardy prohibition has not been violated. The kidnapping-with-bodily-harm and the murder charge are offenses defined by separate statutes with different

elements. In Georgia, kidnapping-with-bodily-harm requires the prosecution to show that the defendant abducted another person without legal authority and held the person against his will and in addition requires that the victim have received bodily injury from the abduction. Ga. Code Ann. § 26-1311. Murder, on the other hand, is the unlawful taking of the life of another with malice aforethought. Ga. Code Ann. § 26-1101. Clearly then, the two offenses require proof of different facts and are not the same within the meaning of the Fifth Amendment. The petitioner, nevertheless, argues that because the killing of Asbell was included as one of the acts of bodily injury in the kidnapping indictment jeopardy attached with the petitioner's guilty plea. This argument is without merit. The double jeopardy clause requires the

court to examine the elements of the offenses and to determine what facts are necessary to sustain a conviction. Homicide is not a necessary element of kidnapping-with-bodily-injury. Furthermore, the kidnapping-with-bodily-injury charge was adequately supported by the allegations of beating, hitting, and kicking set forth in the indictment.

II. ABSENCE OF TRANSCRIPT OF DISTRICT ATTORNEY'S CLOSING ARGUMENT

The petitioner alleges that the district attorney made prejudicial remarks during the closing argument and that the court failed to have the argument transcribed. He alleges that the court failed to have the voir dire transcribed. At the state habeas hearing the respondent produced the affidavit of the trial judge who stated that at the time of the trial

it was the practice of his circuit not to transcribe voir dire or arguments of counsel absent a request and that no request was made by either of petitioner's attorneys despite the fact both knew of the rule. The trial judge also stated that the district attorney "made no allusions to race nor did he use any epithet in referring to" the petitioner. He recalled no prejudicial or inflammatory statements.

The petitioner has failed to demonstrate any error that would form the basis for habeas relief.

III. THE DEATH PENALTY WAS NOT IMPOSED CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS

The United States Supreme Court has upheld Georgia's statutory scheme for the imposition of the death sentence against

a constitutional attack under the Eighth and Fourteenth Amendments. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). All the procedures set forth in those statutes were observed in this case. The jury found beyond a reasonable doubt two statutory aggravating circumstances that the murder was committed by a person with a prior record for a conviction of a capital felony, Ga. Code Ann. § 27-2534.1(b)(1), and by a person who had escaped from lawful custody of a police officer. Ga. Code Ann. § 27-2534.1(b)(9). These findings are supported by the evidence and either finding is grounds for the imposition of the death sentence. On mandatory review to the Georgia Supreme Court, Ga. Code Ann. § 27-3537, the court held that the sentence was not the result of passion or caprice nor was the sentence "excessive or dis-

proportionate to the penalty in similar cases considering both the crime and the defendant." This court must agree with these conclusions.

Accordingly, the petition for a writ of habeas corpus is hereby denied.

The stay of execution issued on February 8, 1979 shall remain in force and effect until such time as respondents move for dissolution on account of petitioner's failure to appeal or affirmance after appeal.

SO ORDERED, this 11th day of May, 1979.

S/Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
United States District Judge

Filed at 10:00 a.m.,
May 11, 1979.

ALPHA OTIS O'DANIEL STEPHENS,

Petitioner-Appellant,

v.

WALTER ZANT, SUPERINTENDENT,

Respondent-Appellee.

No. 79-2407.

United States Court of Appeals,
Fifth Circuit.

June 18, 1981.

Appeal from the United States District Court for the Middle District of Georgia.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion November 26, 1980, 5 Cir., 1980, 631, F.2d 397).

Before INGRAHAM, RONEY and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

Upon consideration of the petition for rehearing filed by the appellee, we delete the following sentence that appears in 631 F.2d 397 on page 406, column 2, line 10:

> The presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of petitioner which otherwise would not have been before it.

The two sentences immediately following the above sentence at page 406 of the slip opinion are modified to read as follows:

> The instruction on the invalid circumstance may have unduly directed the jury's attention to his prior convictions. It cannot be determined with the

degree of certainty required in capital cases that the instruction did not make a critical difference in the jury's decision to impose the death penalty.

The petition for rehearing is DENIED. No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc is DENIED.

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ALEXANDER L. STEVAS,
CLERK

NO. 81-89

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,
Petitioner,

v.

ALPHA OTIS O'DANIEL STEPHENS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

DARYL A. ROBINSON
Assistant Attorney General
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349
Counsel for Petitioner

JAMES C. BONNER
Prisoner Legal Counseling Project
475 North Lumpkin St.
Athens, Georgia 30601
(404) 542-4241
Counsel for Respondent

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

February 8, 1979:

Petition for a Writ of Habeas Corpus filed in the United States District Court for the Middle District of Georgia, Macon Division.

March 6, 1979:

Answer to petition filed.

May 11, 1979:

Order and Judgment for Petitioner Zant denying habeas corpus relief filed in the United States District Court.

June 5, 1979:

Appellee Stephens' Notice of Appeal to the Court of Appeals for the Fifth Circuit filed in the United States District Court.

June 8, 1979:

Order filed by United States District Court Judge Owens granting the Certificate of Probable Cause to Appeal.

November 26, 1980:

Judgment entered in the Court of Appeals for the Fifth Circuit reversing the United States District Court and remanding for further proceedings.

December 8, 1980:

Petition for Rehearing and for Rehearing En Banc filed in the Court of Appeals for the Fifth Circuit.

June 18, 1981:

Order filed in the Court of Appeals for the Fifth Circuit amending the previous opinion and denying the Petition for Rehearing and for Rehearing En Banc.

July 16, 1981:

Petition for a Writ of Certiorari filed by Petitioner Zant docketed in the United States Supreme Court.

October 5, 1981:

Order of the United States Supreme Court granting Petition for a Writ of Certiorari filed by Petitioner Zant.

[Trial Transcript at 14-15]

THE DISTRICT ATTORNEY: I am tendering to the counsel for the defendant certified copies—a certified copy of an indictment and a plea thereon to the offense of Motor Vehicle Theft in Twiggs Superior Court. This will be presented as an exhibit in the event of conviction.

THE COURT: I assume all these exhibits here are for that purpose?

THE DISTRICT ATTORNEY: That's right.

THE COURT: Just give the Defense the Numbers—

THE DISTRICT ATTORNEY: We are numbering them now.

THE COURT: All right.

THE DISTRICT ATTORNEY: Your Honor, I now have them identified as State's Exhibits A through H. They are pleas—indictments and pleas thereon.

THE COURT: I believe the purpose of this is for the record to show that you have given notice of your intention to use these exhibits in the event there is a conviction in this case.

THE DISTRICT ATTORNEY: That is correct, Your Honor.

THE COURT: And I would like to state that the State at a side bar conference indicated before the jury selection process began that you wished to make this tender, and by agreement the offer was reserved until after the jury was selected and back in the jury room so that they would not hear any discussion about it. I think that is all we need to do. You will have an opportunity to object to each one at the proper time in the event they are offered.

MR. HUGH LAWSON: This is not the proper time for objections?

THE COURT: You will have an opportunity later, but if you wish to make some objections now you may do so. This is simply a move on the State's part to give notice to the Defense that the State intends to use these in the event of conviction in this case—intends to use them in Aggravation.

MR. HUGH LAWSON: We acknowledge notice then and reserve our objections.

THE COURT: All right, fine. Are there any other matters to take up at this time?

THE DISTRICT ATTORNEY: No, sir, not by the State.

MR. HUGH LAWSON: No, sir.

THE COURT: All right. Ask the Jury to come in then, please.

* * *

[Trial Transcript at 298-307]

* * *

REPORTER'S NOTE: The jury retires.

THE COURT: I want the record to reflect that counsel have agreed and the Court has approved that the alternate juror, Mr. Mullis, will be isolated and will be utilized to replace one of the regular twelve jurors in the event of sickness or some other emergency requiring the Court to excuse one of the regular jurors, and he is now in isolation. We will be in recess now until the verdict is ready.

REPORTER'S NOTE: After a period of time the Court asks everyone to get in place in the court room and be quiet.

THE COURT: Before the introduction of evidence in this case the District Attorney gave notice on the record that he intended to utilize certain previous records—previous criminal records against the defendant possibly in aggravation, and it was indicated at that time that the defense had some objections to interpose. Of course, this may or may not be appropriate and may or may not serve a purpose in the trial, but it seems like we might very well get rulings in the record at this time, and if they become appropriate and are offered by the defense, at least we wont [*sic*] have to take out further time in the case. Is that procedure agreeable to you, Mr. Mullis?

THE DISTRICT ATTORNEY: Yes, Your Honor.

THE COURT: Mr. West?

MR. WEST: Yes, Your Honor.

THE COURT: All right. Why don't you go ahead and tender those. I believe you have tendered them to opposing counsel earlier haven't you?

THE DISTRICT ATTORNEY: Yes, I have, for inspection.

THE COURT: Are they marked by the Court Reporter?

THE DISTRICT ATTORNEY: Yes, sir, they are marked A through H—State's Exhibits A through H.

THE COURT: All right. Why don't you take them one by one and state what your objections are, Mr. West.

MR. WEST: All right, Your Honor. My objection to State's Exhibit A is that this is a record of a guilty plea

for the defendant in this case on the offense of Motor Vehicle Theft and Robbery, I believe, and Kidnapping of the decedent in this case. My objection is that it is all involved in the same transaction that we are trying to determine—it will be if he is convicted—that we are trying to determine a punishment in today. To allow separate convictions to be entered for conduct arising out of the same occurrence we believe is not what the legislator [*sic*] meant in this Code Section that we are working under. That is, presentence hearings in felony cases. We would argue that it is not admissible just based on the reading of the law.

THE COURT: What does that statute say, Mr. West? Do you have it before you?

MR. WEST: The pertinent part says, "Subject to the laws of evidence the jury or judge shall hear additional evidence in extinuation [*sic*] and mitigation and aggravation of punishment including the record of any prior criminal convictions and pleas of guilty, etc. ." Your Honor, the defense's argument is that the import of that is criminal conduct carried on prior to the situation in which the defendant is being tried—for which the defendant is being tried today. In other words, we are contending that the Kidnapping and the Motor Vehicle Theft and the Robbery or Burglary was all a part and parcel of the same transaction or at least it should be considered that way for sentencing purposes, and thereby exclude the record of those guilty pleas.

THE COURT: All right, let me hear from Mr. Mullis.

THE DISTRICT ATTORNEY: Your Honor, I disagree with Mr. West. I think that is what the law contemplated. These are matters that even though he had

not plead guilty could be taken in aggravation of the case now upon trial. Mr. West read just one portion there. This is more substantial than the Code requires because he had plead guilty to those things in aggravation, Armed Robbery, Kidnapping, Motor Vehicle Theft. Those are the things that were related prior—of course, they are alleged to have occurred on the same date as the matter that is now under trial—now on trial, but the pleas have been entered prior thereto. I will say that this goes even further than the law requires as far as the aggravation situation.

THE COURT: This is not too much unlike the case of State vs. Johnson that we had on appeal from this court, Mr. Mullis. Do you recall that case?

THE DISTRICT ATTORNEY: Yes, sir, I recall it.

THE COURT: I have considerable misgivings about that. I think since a ruling is not required right this moment I may take that section and read it carefully and perhaps try to pull out the Johnson case and take a look at it. Lets move on to B.

MR. WEST: B involves conduct also arising out of this same transaction, Your Honor. I believe this is the Burglary of the residence of Roy Asbell on the day in question, and I would object on the same grounds. C—the one objection applies to the same gambit, and I just save that to last. I don't think it would confuse anything to do that. C—well, I will go ahead and state my objection to the entire thing because it applies to C when none of my other objections do. The Defense contends that these are not properly authenticated as records of conviction based on the fact that—

THE COURT: Now, you are talking about C, D, E, F, G and H?

MR. WEST: A through H.

THE COURT: A through H. All right. That is an over all objection, and it based on the fact that the certificate is not signed by the Clerk. Rather, a stamped impression is made on each of these things. We contend that although that—we contend that a signature is required. We do not know if the Clerk stamped this or who stamped it. We just know that it is stamped or apparently stamped with his name on it.

THE COURT: I will have to see that, please.

MR. WEST: All right, sir.

THE COURT: Do you have any authority or statutes to cite to the Court on this proposition?

MR. WEST: No, Your Honor. This is just on general principles. I think that the Clerk or perhaps his designated agent is required to sign a certificate. I think that is the general principle. I don't have the statute in hand.

THE COURT: All right. Mr. Mullis, do you want to comment about this?

THE DISTRICT ATTORNEY: Yes, sir. I think, Your Honor, any—going back to the old common law where it was general—where you put your seal on something—each person had a ring, I believe, and they put wax down and placed their seal, and that was your affixed seal. I think that related all the way back to then and brought up to date it could be shown that the person in charge with the seal of the Clerk and with that seal affixed to an instrument that it certainly would certify that it is a court record. I think if you will go all the way back and bring

it up to date I believe that that is what it will show. It doesn't say it has to be written by pencil or pen or ink or a type writer or what-have-you, but a seal would be the certification just as the signature was back in the common law of England—just as the signature ring was back then.

THE COURT: Do you have any comments, Mr. West?

MR. WEST: Not on that basis, Your Honor.

THE COURT: All right. I'm going to overrule this particular one. In the first place I'm not able to say positively that that is a stamp. Some people might be able to write that evenly. I also feel that the seal—those are apparently valid court records. They do bear a seal which carries something like a presumption of regularity and officiality. I think the seal would cure whatever might appear to be an irregularity in the signature. Nothing else appearing I rule that those are proper certified copies.

MR. WEST: All right, Your Honor. Just for the record I would like to make the same—well, I have already made it for all of them.

THE COURT: Yes, you have made it for all of them.

MR. WEST: State's Exhibits E, F, G and H while being a record of a conviction also contain the sentence that was entered by the Court in those convictions. I strongly—the Defense strongly contends that this is not what the statute says. The statute plainly says Record of Conviction. It says nothing about prior sentences in those cases. We would say that it would unduly prejudice a jury in this case over and above the fact that offenses are committed. They would have an opportunity to compare sentences and what this man is already serving, and it would unduly influence their decision as to what he

should receive in this case. For that matter the sentence portion should certainly be kept from their consideration.

THE COURT: Well, that certainly is a novel approach, Mr. West. I had always thought that a record of conviction was the indictment, the verdict or plea, and the sentence of the Court thereon. In fact, without the sentence of the Court I don't see how you could tell what really happened. It might have been set aside. The verdict— It might have been reversed or some such matter. Mr. Mullis, do you want to make any observations about this?

THE DISTRICT ATTORNEY: Your Honor, I feel that it is appropriate. I feel that it is a part of the case.

THE COURT: I would say this. There have been several cases in the Appellate Courts to my knowledge where the sentence has come to the attention of the Defense Court without comment. I don't know if anyone ever raised the point up there. I take it you have no case specifically on this point, Mr. West.

MR. WEST: No, Your Honor, I do not.

THE COURT: Ali right. I do overrule the objection. My feeling is that the record of conviction consists of the indictment or accusation, the plea or the finding of a jury, and the sentence of the Court thereon.

MR. WEST: Well, Your Honor, based on your ruling on that Motion I would object to the first four, A through D, on the basis that they do not contain a complete record and that they do not have the sentence.

THE COURT: Well, you have the advantage of having them. I have not seen them. I don't know what you have got there. Do any of these have sentences, Mr. West?

MR. WEST: Do any of them have sentences?

THE COURT: Do any of these proceedings contain the sentence of the Court as adjudged, not—

THE DISTRICT ATTORNEY: No.

MR. WEST: The last four do, Your Honor.

THE DISTRICT ATTORNEY: No.

THE COURT: What is contained there is the sentence of the jury but not the judgement of the court.

MR. WEST: Well, Your Honor, that is what I was contending should not be put before the jury in the first instance. Perhaps technically I stand corrected. Undoubtedly I do, but that is the information that I was objecting to.

THE DISTRICT ATTORNEY: I have no objection to the sentence part—the sentence portion of it being obliterated or scratched through. It is just notations is what they are. I have no objections to those notations being obliterated in such a way that they cannot be seen.

THE COURT: All right. My ruling is that these matters may be considered. While I felt and still feel that if the sentence of the Court was here it would be properly included I also feel that the record as established barring some other showing by the accusation or indictment and the plea thereto or the finding of guilt thereon should not be—that these items should not be excluded just because some other part of the court record is not present. So that particular objection will be overruled. Are there other points?

MR. WEST: None by the Defense, Your Honor.

THE COURT: All right. I will take under advisement this special objection to A and B which involve offenses

arising out of the same identical course of conduct which occurred at substantially the same time. Frankly, I believe you can anticipate an adverse ruling to the State on that.

THE DISTRICT ATTORNEY: Your Honor, that could be distinguished from the Johnson case. If you are going to refer to that I think the two can be distinguished. I think—I believe what Your Honor ruled—I believe what the Court ruled in that case was that the occurrence —in other words, the crime was committed after the crime for which he was tried, but he was first tried on the other one. I believe the Court said it had to be a subsequent crime to the one that he was on trial for. I don't believe the Court ruled on the point that you are talking about there. It is subsequent offenses.

THE COURT: Well, let me put my thinking this way. These statutes should be strictly construed in favor of the accused.

THE DISTRICT ATTORNEY: Yes, sir.

THE COURT: There are aggravating circumstances which may be considered by the jury if they find them to be proven beyond a reasonable doubt, and some of those involved incidents closely related in time which can serve as an aggravating circumstance. Now to use as aggravation what some other Court finds and some other Jury finds would unnecessarily complicate this proceeding. That is part of my rationale about that.

THE DISTRICT ATTORNEY: But, Your Honor, you are not ruling out the argument to the Jury that such did take place?

THE COURT: No. I do not mean to do that at all.

THE DISTRICT ATTORNEY: All right.

THE COURT: As you gathered from the evidence presented in this trial here today and yesterday.

THE DISTRICT ATTORNEY: Yes, sir. I understand.

THE COURT: I think you can anticipate that I will give you a final word about this—we will not have to go back into it again, if we have to consider it at all.

THE DISTRICT ATTORNEY: All right, sir.

THE COURT: But you can anticipate I think at this time that A and B will be excluded and that C, D, E, F and G and H will be admitted. I will give you further opportunity to comment for any new things you want to bring up later. All right, we will be in further recess.

* * *

[Trial Transcript at 313-26]

* * *

THE COURT: Mr. Foreman, have the jury arrived at a verdict in this case?

JURY FOREMAN: We have, Your Honor.

THE COURT: You will please hand the indictment to one of the bailiffs. Which bailiff will receive it? Come over and receive it. We will ask the Clerk to receive the verdict from the bailiff and to read and publish that verdict.

CLERK OF COURT, MRS. GYNELLE VAN BUREN: Case Number 6713, State vs. Alpha Otis O'Daniel Stephens for Murder. We, the Jury, find the defendant guilty as charged this 21st day of January, 1975. Abbie G. Giddens, Foreman.

THE COURT: All right. Will the State have other evidence to present at this time?

THE DISTRICT ATTORNEY: Yes, Your Honor. The State will tender into evidence State's Exhibits H,G, C,D,E and F. I offer those into evidence.

THE COURT: All right. I believe I learned it C,D,E, F,G and H. Is that correct?

THE DISTRICT ATTORNEY: Well, I was just calling them out as I had them here. I can place them in order. All right, sir, I offer C,D,E,F,G and H into evidence.

THE COURT: C through H. All right. Now, certain objections are already entered by Defense Counsel, and they need not be renewed and insisted upon. I will consider them renewed and overruled. Are there any other objections to be made at this time?

MR. WEST: No, Your Honor.

THE COURT: All right, State's Exhibits C through H are admitted into evidence at this time.

THE DISTRICT ATTORNEY: There is no other evidence by the State to be presented, Your Honor.

THE COURT: All right. Do you simply wish to present those to the jury, or do you wish to read them or what?

THE DISTRICT ATTORNEY: Your Honor, I wish to just present them to the jury. The Court has admitted them, is that right?

THE COURT: Yes.

THE DISTRICT ATTORNEY: Well, I just wish to present them to the jury, and I wish to argue the case.

THE COURT: All right.

THE DISTRICT ATTORNEY: Argue the matter.

THE COURT: All right. Mr. West and Mr. Lawson,

will you have anything to present for the Defense?

MR. WEST: Yes, Your Honor, we do. We would like the Defendant to take the stand and testify.

THE COURT: That is his right, and he may do so. He may do so at this time.

MR. ALPHA OTIS O'DANIEL STEPHENS, HAVING FIRST BEEN DULY SWORN AS A WITNESS TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION BY MR. WEST

Q. Now, Mr. Stephens, you have been convicted of the crime of the Murder of Mr. Roy Asbell. I want you to take this time to tell the jury what actually transpired on the night in question.

THE DISTRICT ATTORNEY: Your Honor, I would object to that as going into the trial of the issue, and the evidence as to what has happened is closed.

THE COURT: I agree with you that he is not permitted to impeach the verdict. However, I am not able to say that something that he will not say in recounting this would not be considered as mitigating or extinuating [*sic*] by the Jury. I don't know how I could possibly exclude that unless and until I hear what he says, and I would not presume also to say for the jury what they might find in extinuation [*sic*] and mitigation. So that objection is overruled. You may proceed.

Q. Proceed, Mr. Stephens.

A. Well, the fact is that I have never denied my guilt in the case. You see, I am guilty. What I wanted to get over to you people and the Judge is that I didn't pull the trigger. The way the whole thing happened was this man come up while we was coming out of the house. He came

up, and he said, "What are you niggers doing in my house". I said, "The car ran hot", you know. I said, "It ran hot and wouldn't crank". So I walked to the car where he was. He was getting out of the car. He saw the rifles we had in the car because the door was open. We had got them out of the house, you know. Then he went into his pocket, and he came out with a 38 Deringer. I kicked his arm. That was the only lick. The gun fell back on the seat, and I pulled him out away from it and got the gun and put it in my pocket. I went back to try to crank the Dodge, but it wouldn't crank. So I put him in his car and carried him down the road, not intending to kill him but to tie him up. I carried him almost there, which I was pretty high. Both of us was pretty high. When I got out of the car I stumbled in the ditch. That is how the mud got on my shoe—my right shoe—and the scratches. We got out of the car, and he crossed the fence, which he didn't run because he couldn't run. He walked with a limp. He went in the house. He was walking real fast, and he went in the house. Kellog asked me did I want to go after him. I said, "No, let him go". I said, "By the time he can get somewhere and call the police we can be about four or five miles down the road, at least to Dublin." He said, "No, we had better get him". So we walked on across the field and went into the house. I didn't have the gun. I gave him the gun before we left the house. So we walked up on the front porch, and when we opened the door he backed up, and then he went in. I was coming up the steps, and I heard two shots. I turned around on my heel and went back down the steps. He come on out there, and he said, "The man had a stick". It was a piece of iron, not no stick. So he come out, and he tied the door back up and walked on back to the car. He had got the man's bill fold, and he looked in it, and that is when he pulled the money out of it. He pulled

the money out, and the papers flew out when he threw it up in the bushes. That explains where the man found it, you know. That little notebook fell down too, and then we got into the car, and I drove. The blood that was in the car was from my right hand, which I cut there at the man's house. So after that I got stoned. I went to Savannah. I got pretty high. I met this girl. About three o'clock I drank some more—I dropped some more pills. I had about two of them left. They was in my pocket when they carried me to jail. I took one that next morning, and then later on the other one, and I was about out of it all that day. They were small pills, about as big as a match head. All that statement that that detective was talking about me making, I don't know nothing about that. That's the truth. As far as that man getting killed, I'm sorry about that. I aint [*sic*] going to tell you no lie. If I could bring him back, I probably would, but that I can't do. There aint [*sic*] nothing I can do about it. If I had shot him, I would say I shot him. I would tell you or anybody else I shot him if I did. So whatever you all come up with is all right with me. I know I deserve being punished.

Q. O.K., Mr. Stephens.

MR. WEST: That's all that we have from this witness.

THE COURT: All right. I think under the law he would be subject to cross examination. I take it that you do not argue with that.

MR. WEST: I don't argue with that principle, Your Honor.

THE COURT: You may cross examine, Mr. Mullis.

THE DISTRICT ATTORNEY: All right, sir.

CROSS EXAMINATION OF MR. ALPHA OTIS O'DANIEL STEPHENS BY THE DISTRICT ATTORNEY

Q. Now, you have made contrary statements to the effect that you—you come in here late in the day and say that you weren't the one who pulled the trigger. Did you not tell the sheriff that you shot him and that you weren't losing any sleep over it?

A. No, I didn't tell him that.

Q. Do you recall when he was taking you back from the Commitment Hearing?

A. No.

Q. You told him and Mr. Randy Johnson that you shot him and that you weren't losing any sleep over it?

A. Well, let me tell it to you like this. What have I got to lose? I'm serving five life sentences plus fifty years. If I had shot that man, I would tell you I shot him. I would tell you, him or anybody else if I had shot him.

Q. In other words, —he had something to lose though. He lost his life.

A. I didn't take it. That's what I'm trying to get across to these men. I would have copped out from the beginning for a life sentence if I did it. The reason I had this trial here before these people here is I didn't pull the trigger on the man.

Q. This is the first time you have ever uttered that statement isn't it?

A. No, it aint [*sic*] the first time.

Q. Who have you told besides your lawyers that you were going to make such a statement?

A. I aint [*sic*] told nobody.

Q. Nobody. That's right.

A. I aint [*sic*] told nobody but myself.

THE DISTRICT ATTORNEY: No further questions.

THE COURT: Any other questions?

MR. WEST: No, Your Honor. Come down, Mr. Stephens. The Defense has no further evidence in extinuation [*sic*] or mitigation.

THE COURT: Will the State have anything further?

THE DISTRICT ATTORNEY: No, sir.

THE COURT: I believe the jury left all of the evidence in the jury room. I don't know if you will need to refer to any of it in your arguments, but if you do I will send a bailiff to the jury room to get it. The State, as I understand the law, has the right to open here, and the Defense has the right to conclude.

THE DISTRICT ATTORNEY: Your Honor, if it is agreeable I will reserve my concluding remarks and just make one argument.

THE COURT: As I understand it, Mr. Mullis, the State has only the opening argument. The Defense has the concluding argument.

THE DISTRICT ATTORNEY: All right, sir, I will go forward with it then.

THE COURT: We might be able to threash [*sic*] this out, but I understand that you do not have any closing at all. The State has the opening, and the Defense has the closing. I have that statute here.

THE DISTRICT ATTORNEY: That's all right then. I will go forward at this time. I'm ready. The State is ready.

THE COURT: All right.

REPORTER'S NOTE: Arguments are made to the jury by the District Attorney, Mr. Hugh Lawson and Mr. Phillip R. West respectively.

FURTHER CHARGE OF THE COURT:

Gentlemen of the Jury, the defendant in this case has been found guilty at your hands of the offense of Murder, and it is your duty to make certain determinations with respect to the penalty to be imposed as punishment for that offense. Now in arriving at your determinations in this regard you are authorized to consider all of the evidence received in court throughout the trial before you. You are further authorized to consider all facts and circumstances presented in extinuation [*sic*], mitigation and aggravation of punishment as well as such arguments as have been presented for the State and for the Defense. Under the law of this State every person guilty of Murder shall be punished by death or by imprisonment for life, the sentence to be fixed by the jury trying the case. In all cases of Murder for which the death penalty may be authorized the jury shall consider any mitigating circumstances or aggravating circumstances authorized by law. You may consider any of the following statutory aggravating circumstances which you find are supported by the evidence. One, the offense of Murder was committed by a person with a prior record of conviction for a Capital felony, or the offense of Murder was committed by a person who has a substantial history of serious assaultive criminal convictions. Two, the offense of Murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. Three, the offense of Murder was committed by a person who has escaped from the lawful

custody of a peace officer or place of lawful confinement. These possible statutory circumstances are stated in writing and will be out with you during your deliberations on the sentencing phase of this case. They are in writing here, and I shall send this out with you. If the jury verdict on sentencing fixes punishment at death by electrocution you shall designate in writing, signed by the foreman, the aggravating circumstances or circumstance which you found to have been proven beyond a reasonable doubt. Unless one or more of these statutory aggravating circumstances are proven beyond a reasonable doubt you will not be authorized to fix punishment at death. If you fix punishment at death by electrocution you would recite in the exact words which I have given you the one or more circumstances you found to be proven beyond a reasonable doubt. You would so state in your verdict, and after reciting this you would state, We fix punishment at death. On the other hand, if you recommend mercy for the defendant this will result in imprisonment for life of the defendant. In such case it would not be necessary for you to recite any mitigating or aggravating circumstances as you may find, and you would simply state in your verdict, We fix punishment at life in prison. Now, whatever your verdict may be with respect to the responsibility you have regarding sentencing please write these out, Mr. Foreman, immediately below the previous verdict you have rendered. Be sure that it is dated and that it bears your signature as foreman. Once again when you have arrived at your verdict on the sentencing phase of the case let us know. We will then receive the verdict from you and have it published here in open court. Please retire now and consider the sentence in this case.

REPORTER'S NOTE: The jury retires from the court room.

THE COURT: Would the Defense like to make any observations or objections to the Charge—I mean the State?

THE DISTRICT ATTORNEY: Your Honor, the State is satisfied that the Court has instructed the Jury fully and fairly.

THE COURT: Mr. West, would you like to make any observations? Once again, you are not required to make any observations whatever—Mr. West or Mr. Lawson.

MR. HUGH LAWSON: May it please the Court, the Defense objects to the inclusion of the second statutory ground charged by the Court in this portion of the charge. The Defense objects to the oral charge to the jury of that and then to sending it out in writing with the jury. We object to that on the grounds that that portion—that the facts of the case do not support the inclusion of the entire ground.

THE COURT: All right. I have studied these matters very carefully. We have very little from the Appellate Courts to guide us on exactly what grounds to be included. My ruling is that—of course, I have no idea what this jury will find, but my ruling is that there is a possible range of facts that would authorize the finding by the jury supporting this particular ground. Therefore, your objection is overruled.

MR. HUGH LAWSON: Just for the record, is my objection clear? I'm referring to the second statutory ground. I can't quote it verbatim.

THE COURT: I think so. You probably are specifically objecting to the language, the murder was outrageously or wantonly vile, horrible or inhuman in that it involved

torture, depravity of mind or an aggragated battery on the victim.

MR. HUGH LAWSON: Yes, sir.

THE COURT: That is the part of it I would assume you are referring to.

MR. HUGH LAWSON: Yes, sir, that's the one I was referring to.

THE COURT: There is evidence here of the injury inflicted upon the deceased, his being taken by force. Whether all these acts—what happened out there at the scene or [*sic*] vile, horrible or inhuman and involved torture and depravity of mind, I'm going to leave that to the jury. Are there any other observations?

MR. HUGH LAWSON: No, sir.

THE COURT: All right, thank you. We will be in recess until the jury reaches a verdict.

REPORTER'S NOTE: After a period of time the Court asks that the attorneys get back in place.

THE COURT: I'm going to discharge the alternate juror at this time. Ask the alternate juror to please come on into the court room, please.

REPORTER'S NOTE: The laternate [*sic*] juror stands before the Court.

THE COURT: You might go over and sit down at the end of the jury box and let me have a final word with you, please. First, Mr. Mullis, let me inform you that the jury have made findings of guilty in this case, and they are now in the process of discharging their duty by fixing the penalty to be imposed in the case. I think we are far enough along now that the Court can go ahead and excuse you from your involvement in this case. I never have

figured out exactly what to say to an alternate juror. You have a very heavy responsibility, and yet you don't really accomplish anything. You don't have the sense of accomplishment of doing something that perhaps other jurors do. I guess this is just a penalty for being a citizen. We do thank you for your service. We will look for you back in the court room at nine o'clock in the morning. You are excused at this time.

REPORTER'S NOTE: After a period of time we again come before the Court.

THE COURT: Gentlemen, it has been some little time since the jury went out. I propose at this time to bring the jury in and find out if they wish to continue their deliberations tonight, and if they do to send for some light food and refreshments for them. What they tell me may lead to some other course of conduct on my part. I will be glad to discuss that with counsel depending upon what is said. I assume there is no objection to my doing this?

THE DISTRICT ATTORNEY: No, sir.

MR. WEST: No, Your Honor.

THE COURT: All right. Ask the jury to come in, please.

REPORTER'S NOTE: The bailiff goes to the jury room door, and then returns to the court room.

BAILIFF ALLEN: Your Honor, they asked for a five minute delay before coming in.

THE COURT: All right, fine. We will just remain in place.

REPORTER'S NOTE: After a few minutes there is a knock on the jury door.

THE COURT: See if they are ready to come in.

REPORTER'S NOTE: The jury is in the jury box.

THE COURT: Mr. Foreman, have the jury arrived at a verdict as to sentence?

JURY FOREMAN: We have, Your Honor.

THE COURT: All right, fine. If you will hand the indictment there to the bailiff I will ask him to bring it around to the Clerk, and we will ask our Clerk to read and publish the verdict. The sheriff can take those papers.

MRS. GYNELLE VAN BUREN, CLERK OF COURT: We, the Jury, recommend the death penalty. (1) The offense of Murder was committed by a person with a prior record of conviction for a capital felony. The offense of Murder was committed by a person who has a substantial history of serious assaultive criminal convictions. (2) The offense of Murder was committed by a person who has escaped from the lawful custody of a peace officer and place of lawful confinement. Abbie G. Giddens, Foreman. 21 January, 1975.

THE COURT: The verdict seems to be in proper form. I will be glad to submit the verdict to counsel to read if you wish.

THE DISTRICT ATTORNEY: No, sir, I do not wish to see it, Your Honor.

MR. WEST: No, Your Honor, we do not wish to examine the verdict.

SPECIAL PRESENTMENT

GEORGIA, TWIGGS COUNTY:

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors, selected, chosen and sworn for the County of Twiggs, to wit:

1. WALKER ROLAND Foreman

2. E. F. HARDY
3. JIMMY ELI LUCAS
4. MARVIN BROWN, JR.
5. BARBARA LOUISE DENNARD
6. L. J. BROWN
7. ROBERT HARRISON FLOYD
8. [illegible]
9. [illegible]
10. [illegible]
11. DAVID McNEELY
12. ELLISTINE MALONY JOHNSON
13. HARDIE LEE KITCHENS
14. JEROME NOBY, JR.
15. MRS. GEORGE W. FAULK
16. JAMIE B. FRILIAN
17. BERNARD J. HOWELL
18. B. P. HUMPHRIES
19. JULIAN J. LINLEY
20. WILBUR CECIL McCARTY
21. BEN HILL HORTON
22. JOHN C. BURNS, JR.
23. BENJAMIN SINCLAIR

In the name and behalf of the citizens of Georgia, charge and accuse ALPHA OTIS O'DANIEL STEPHENS, alias ALPHA OTIS DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY BOY STEPHENS, alias JAMES DANIEL, alias WILLIE JAMES TYLER, alias WILL TYLER, alias ALPHA STEPHENS, and CLAUDE SAMPSON, alias KELLOGG SAMPSON

with the offense of ARMED ROBBERY

for that the said ALPHA OTIS O'DANIEL STEPHENS, alias ALPHA OTIS DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY BOY STEPHENS, alias JAMES DANIEL, alias WILLIE JAMES TYLER, alias WILL TYLER, alias ALPHA STEPHENS, and CLAUDE SAMPSON, alias KELLOGG SAMPSON

(See A PORTION OF STATE'S EXHIBIT C

SPECIAL PRESENTMENT:
PAGE TWO

CR-300

in the County and State aforesaid, on the 20th day of August, in the year of our Lord Nineteen Hundred and Seventy-Four, did unlawfully with intent to commit theft, took from the person or immediate presence of Mr. Paul Riley the following described property, to wit: $250.00 in lawful United States Currency, the property of Mr. Paul Riley, trading and doing business as Riley's Grocery, said business located on Georgia Highway 57 in Twiggs County, Georgia, and said property being of the value of $250.00, by use of a pistol, the same being an offensive weapon, contrary to the laws of said State, the good order, peace and dignity thereof.

SPECIAL PRESENTMENT:

Beverly B. Hayes

BEVERLY B. HAYES
DISTRICT ATTORNEY

TWIGGS SUPERIOR COURT
OCTOBER TERM, 1974

-349- A PORTION OF STATE'S EXHIBIT C

PLEA OF DEFENDANT WITH COUNSEL

The defendant(s) [illegible] alias [illegible] alias [illegible] alias

SPECIAL PRESENTMENT

GEORGIA, TWIGGS COUNTY:

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors, selected, chosen and sworn for the County of Twiggs, to wit:

1. WALKER ROLAND Foreman

2. E. F. HARDY
3. JIMMY ALI LUCAS
4. MARVIN HOUSE, JR.
5. BARBARA LOUISE DENNARD
6. L. J. BRAN
7. ROBERT HARRISON FLOYD
8. WILLIAM WALL
9. WOODROW LITTLE, JR.
10. WILLIAM E. BARRENTINE
11. DAVID KIMBERLY
12. ELLISTINE MALLORY JORDAN
13. HARDIN LEE KITCHENS
14. JEROME NEWBY, JR.
15. MRS. GEORGE W. PAULK
16. JANIE D. FREEMAN
17. BERNARD J. HOWELL
18. B. F. HUMPHRIES
19. BILLY J. LINLEY
20. WILLIAM CECIL FOGARTY
21. [illegible] HILL DUNCAN
22. JOHN C. BURNS, JR.
23. BENJAMIN SINCLAIR

In the name and behalf of the citizens of Georgia, charge and accuse ALPHA OTIS O'DANIEL STEPHENS, alias ALPHA OTIS DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY BOY STEPHENS, alias JAMES DANIEL, alias WILLIE JAMES TYLER, alias WILL TYLER, alias ALPHA STEPHENS, and CLAUDE SAMPSON, alias KELLOGG SAMPSON

with the offense of BURGLARY

for that the said ALPHA OTIS O'DANIEL STEPHENS, alias ALPHA OTIS DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY BOY STEPHENS, alias JAMES DANIEL, alias WILLIE JAMES TYLER, alias WILL TYLER, alias ALPHA STEPHENS, and CLAUDE SAMPSON, alias KELLOGG SAMPSON

-372- A PORTION OF STATE'S EXHIBIT NUMBER D

SPECIAL PRESENTMENT:
PAGE TWO

0025J

in the County and State aforesaid, on the 21ST day of August,
in the year of our Lord Nineteen Hundred and Seventy- Four, did
unlawfully and without authority and with intent to commit a theft therein,
entered the dwelling house being the residence of David Hightower, contrary
to the laws of said State, the good order, peace and dignity thereof.

SPECIAL PRESENTMENT

Beverly B. Hayes

BEVERLY B. HAYES
DISTRICT ATTORNEY

TWIGGS SUPERIOR COURT
OCTOBER TERM, 1974

-373- A PORTION OF STATE'S EXHIBIT D

PLEA OF DEFENDANT WITH COUNSEL

The defendant(s) ALPHA OTIS O'DANIEL, JR. [illegible], alias ALPHA OTIS DANIEL STEPHENS, alias [illegible] alias JOHN DANIEL, alias WILLIE [illegible]

being represented by the undersigned attorney(s), waives/demands copy of special presentment and list of witnesses; waives/demands being formally arraigned, and pleads [illegible] Copy of Special Presentment and List of Witnesses received.

This 17th day of OCTOBER, 1974

Beverly B. Hayes
Beverly B. Hayes, District Attorney

Alpha Stephens
Defendant

[illegible]
Defendant's Attorney

for all the reasons stated in the attached

The defendant(s), _____

being represented by the undersigned attorney(s), waives/demands copy of special presentment and list of witnesses; waives/demands being formally arraigned, and pleads _____ Copy of Special Presentment and List of Witnesses received.

This _____ day of _____, 19____

Beverly B. Hayes, District Attorney

Defendant

Defendant's Attorney

1S206

P 1-20

No. 1

THE STATE

vs.

ALPHA OTIS O'DANIEL, JR. [illegible], alias ALPHA OTIS DANIEL STEPHENS, alias [illegible] alias JOHN DANIEL, alias WILLIE [illegible] alias [illegible] and [illegible] alias [illegible]

[illegible] Superior Court

OCTOBER Term, 19 74

Sept 16 3

Filed [illegible] day of [illegible], 19[illegible]

[illegible]
Deputy Clerk

Sent. rec.

This 16th day of Oct., 19 74

Sheriff

Deputy

Beverly B. Hayes
BEVERLY B. HAYES
District Attorney

VERDICT

We, the Jury, find the defendant, _____

This ____ day of _____, 19____

Foreman

Sheriff A. G. Hardwick
Dep. Sheriff Charles Thaxton
Deputy David Hightower
Deputy [illegible]

Office of Beverly B. Hayes
Dist. Atty. Rockdale Judicial Circuit

Ret. Order & Bench Warrant
Ret. Writ not to be executed
Before the Grand Jury

Before the Grand Jury

Rep during Christmas Recess

A PORTION OF STATE'S EXHIBIT D

374

GEORGIA, TWIGGS COUNTY

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors, selected, chosen and sworn for the County of TWIGGS, to-wit:

HUGH GLENN DYKES, Foreman

2. F. G. BLOUNT	13. STEPHEN H. HAMRICK
3. WASHINGTON SINCLAIR	14. DOYLE L. STONE, SR.
4. BUNYON FAULK	15. TOMMY E. SMITH
5. SPURGEON W. SIMMONS	16. BERTHA MAE EASON
6. MARK W. FITZPATRICK	17. MYRON J. WARREN
7. FRED LARSEN	18. JEROME L. NEWBY, III
8. MYRTLE H. RAWLINS	19. CHARLOTTE CABINESS
9. S. M. CALLEMORE	20. DAN S. FAULK
10. WILFRED SOLOMON EMORY	21. BENNIE F. JOHNSON, JR.
11. GERALDINE C. GRUBBS	22. MILDRED CLARKE BURNS
12. DAN JEROME HASTY	23. LILLIE GRACE EASON

COUNT I

In the name and behalf of the citizens of Georgia, charge and accuse Gus Beeles, Robert Lee Russell, alias Pete Russell, and Alpha Otis Odaniel Stephens, alias Sonny Boy Stephens and alias Alfred Stephens, of the County and State aforesaid, with the offense of BURGLARY

for that the said Gus Beeles, Robert Lee Russell, alias Pete Russell, and Alpha Otis Odaniel Stephens, alias Sonny Boy Stephens and alias Alfred Stephens in the County aforesaid, on the 20th day of April, in the year of our Lord Nineteen Hundred and Seventy-Three, with force and arms, did unlawfully and without authority and with intent to commit a theft therein, enter the dwelling house of Mrs. Selma Hamrick Mercer, and did commit a theft therein, the value of the property taken exceeding a value of $100.00, all contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT II

And the aforesaid named Grand Jurors, selected chosen and sworn for the County of Twiggs, State of Georgia, in the name and behalf of the citizens of Georgia, charge and accuse Gus Beeles, Robert Lee Russell, alias Pete Russell, and Alpha Otis Odaniel Stephens, alias Sonny Boy Stephens and alias Alfred Stephens, of the County and State aforesaid, with the offense of Burglary, for that the said Gus Beeles, Robert Lee Russell, alias Pete Russell, and Alpha Otis Odaniel Stephens, alias Sonny Boy Stephens and alias Alfred Stephens, in the county aforesaid on the 20th day of April, in the year of our Lord Nineteen Hundred and Seventy-Three, with force and arms, did unlawfully and without authority and with intent to commit a theft therein, enter the dwelling house of Earl Fountain, and did commit a theft therein, the value of the property taken exceeding a value of $100.00, all contrary to the laws of said State, the good order, peace and dignity thereof.

Count 1 Stephens 3 yrs Conc. w/ 1445
" " 3 yrs Conc
Count 1-16

SPECIAL PRESENTMENT:

Beverly B. Hayes
BEVERLY B. HAYES, DISTRICT ATTORNEY

TWIGGS SUPERIOR COURT
APRIL TERM, 1973

Received in Open Court April Term 1973

-376- A PORTION OF STATE'S EXHIBIT E

PLEA OF DEFENDANT WITH COUNSEL

The defendant, ALIAS OTIS ODANIEL STEPHENS, alias SONNY BOY STEPHENS, being represented by the undersigned attorney, ~~waives/demands~~ copy of special presentment and list of witnesses, ~~waives/demands~~ being formally arraigned, and pleads GUILTY. Copy of Special Presentment and List of Witnesses received.

This 16th day of November, 19 73.

Beverly B. Hayes, District Attorney

Defendant

Defendant's Attorney

PLEA OF DEFENDANT WITHOUT COUNSEL

The defendant, _____, appearing by his own choice without counsel acknowledges that the Judge of the Court has fully advised him of his right to counsel at all stages of the case against him, acknowledges that the Judge has offered and does now offer to appoint an able attorney to act as counsel for defendant, and the defendant has refused to accept the services of such counsel and now so refuses and the defendant, so refusing to have counsel represent him and so refusing to have counsel advise him, does hereby waive copy of Special Presentment and List of Witnesses, does hereby waive formal arraignment, and pleads

_____

This _____ day of _____, 19____

Beverly B. Hayes, District Attorney

Defendant

THE STATE

vs.

GUS REEVES, ROBERT LEE RUSSELL, alias FELIX RUSSELL, and ALPHA OTIS ODANIEL STEPHENS, alias SONNY BOY STEPHENS, and ALPHA ALFRED STEPHENS.

BURGLARY (2 Counts)

Filed this 16th day of November, 1973

Beverly B. Hayes, District Attorney

Stephens: Sentenced to 3 yrs. to run concurrent with Case #'s 14 and 15

WITNESSES FOR THE STATE

Sheriff Earl Hamrick
Deputy Charles Thorpe
Chief of Police O. E. Poole
Mrs. Selma Hamrick Tarver
Earl Fountain

WITNESSES APPEARING BEFORE THE GRAND JURY

VERDICT

We, the jury, find the defendant _____ guilty as charged in the indictment.

This _____ day of _____, 19____

_____

Foreman

No. 3-377

ADMITTED OF STATE'S EXHIBIT 2

SPECIAL PRESENTMENT

GEORGIA, ... TWIGGS ..... COUNTY.

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors, selected, chosen and sworn for the County of ..... TWIGGS ..... term

1. HUGH GLENN DYKES, Foreman

2. F. G. BLOUNT
3. WASHINGTON SINCLAIR
4. BUNYON FAULK
5. SPURGEON W. SIMMONS
6. MARK W. FITZPATRICK
7. FRED LARSEN
8. MYRTLE H. RAWLINS
9. S. H. GALLEMORE
10. WILFRED SOLOMON EMORY
11. GERALDINE C. GRUBBS
12. DAN JEROME HASTY
13. STEPHEN H. HAMRICK
14. DOYLE L. STONE, SR.
15. TOMMY E. SMITH
16. BERTHA MAE EASON
17. MYRON J. WARREN
18. JEROME L. NEWBY, III
19. CHARLOTTE CABINESS
20. DAN S. FAULK
21. BENNIE F. JOHNSON, JR.
22. MILDRED CLARKE BURNS
23. LILLIE GRACE EASON

In the name and behalf of the citizens of Georgia, charge and accuse ALPHA OTIS ODANIEL STEPHENS, alias SONNY BOY STEPHENS and alias ALFRED STEPHENS,

of the County and State aforesaid, with the offense of BURGLARY

for that the said ALPHA OTIS ODANIEL STEPHENS, alias SONNY BOY STEPHENS and alias ALFRED STEPHENS in the County aforesaid, on the 17th day of April, in the year of our Lord Nineteen Hundred and Seventy-Three, with force and arms, did unlawfully and without authority and with intent to commit a theft therein, enter the dwelling house of Royce Baxley and did commit a theft therein, all contrary to the laws of said State, the good order, peace and dignity thereof.

SPECIAL PRESENTMENT:

Beverly B. Hayes

BEVERLY B. HAYES, DISTRICT ATTORNEY

TWIGGS SUPERIOR COURT
APRIL TERM, 1973

3-7-74

-379- A PORTION OF STATE'S EXHIBIT P

PLEA OF DEFENDANT WITH COUNSEL

The defendant, Alpha Otis Stephens alias Sonny Boy Stephens

being represented by the undersigned attorney, waives copy of indictment and list of witnesses, waives being formally arraigned, and pleads Guilty Copy of Indictment/Presentment and List of Witnesses received.

This 16th day of December 19 73

[signature] District Attorney

[signature] Defendant's Attorney

PLEA OF DEFENDANT WITHOUT COUNSEL

The defendant, _____

appearing by his own choice without counsel acknowledges that the Judge of the Court has fully advised him of his right to counsel at all stages of the case against him, acknowledges that the Judge has offered and does now offer to appoint an able attorney to act as counsel for defendant, and the defendant has refused to accept the services of such counsel and now so refuses and the defendant, so refusing to have counsel represent him and so refusing to have counsel advise him, does hereby waive copy of Special Presentment and List of Witnesses, does hereby waive formal arraignment, and pleads

_____

This _____ day of _____ 19____

_____ Beverly B. Hayes, District Attorney

_____ Defendant

No. 146

TWIGGS Superior Court

APRIL Term, 1973

THE STATE

vs.

ALPHA OTIS COMMIEL STEPHENS, alias SONNY BOY STEPHENS, and alias ALFRED STEPHENS.

BURGLARY

Filed in Office

Clerk

By Deputy Clerk

BEVERLY B. HAYES
District Attorney

WITNESSES FOR THE STATE:

Sheriff Earl Ramrick
Boyce Ramrick, Route #4,
Macon, Georgia

WITNESSES APPEARING BEFORE THE GRAND JURY:

VERDICT

We the jury, find the defendant

This _____ day of _____ 19____

Foreman

A PORTION OF STATE'S EXHIBIT F

SPECIAL PRESENTMENT

GEORGIA, TWIGGS COUNTY:

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors, selected, chosen and sworn for the County of Twiggs, to wit;

00292

1. WALKER ROLAND Foreman

2. E. F. HARDY
3. JIMMY ELI LUCAS
4. MARVIN BROWN, JR.
5. BARBARA LOUISE DENNARD
6. L. J. BROWN
7. ROBERT HARRISON FLOYD
8. WILLIAM WALL
9. WOODROW [illegible], JR.
10. WILLIAM E. BARRENTINE
11. DAVID WINBERLY
12. ELLISTINE MALLORY JORDAN
13. HARDIE LEE KITCHENS
14. JEROME MIMS, JR.
15. MRS. GEORGE M. FAULK
16. JAMIE D. FREEMAN
17. BERNARD J. HOWELL
18. B. T. HEPHERIES
19. JULIAN J. LUMLEY
20. WILBUR CECIL FOUGERTY
21. BEN HILL HORTON
22. JOEL C. BURNS, JR.
23. BENJAMIN SINCLAIR

COUNT I

In the name and behalf of the citizens of Georgia, charge and accuse FRANCES NORWOOD ROSS, EDNA MATHIS, JO ANN NORWOOD, DELORIS McPHERSON, and ALPHA OTIS O'DANIEL STEPHENS, alias ALPHA OTIS DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY BOY STEPHENS, alias JAMES DANIEL, alias WILLIE JAMES TYLER, alias WILL TYLER, alias ALPHA STEPHENS

-382- A PORTION OF STATE'S EXHIBIT G

with the offense of ARMED ROBBERY

for that the said FRANCES NORWOOD ROSS, EDNA MATHIS, JO ANN NORWOOD, DELORIS McPHERSON, and ALPHA OTIS O'DANIEL STEPHENS, alias ALPHA OTIS DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY BOY STEPHENS, alias JAMES DANIE alias WILLIE JAMES TYLER, alias WILL TYLER, alias ALPHA STEPHENS

-383- A PORTION OF STATE'S EXHIBIT G

SPECIAL PRESENTMENT:
PAGE TWO

in the County and State aforesaid, on the 18th day of May, in the year of our Lord Nineteen Hundred and Seventy- Three, did unlawfully with the intent to commit theft, took from the person or immediate presence of Miss Louise Mercer the following described property, to wit: $360.00 in lawful United States Currency of the property of Ralph Mercer, trading and doing business and known as Mercer's Grocery which is located off United State Highway 80 in Twiggs County, Georgia, said property being of the value of $360.00, by use of a pistol, the same being an offensive weapon, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT II

And the aforesaid Grand Jurors, selected, chosen and sworn for the County of Twiggs and State of Georgia, in the name and behalf of the citizens of Georgia, charge and accuse FRANCES NORWOOD ROSS, EDNA MATHIS, JO ANN NORWOOD, DELORIS McPHERSON, and ALPHA OTIS O'DANIEL STEPHENS, alias ALPHA OTIS DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY BOY STEPHENS, alias JAMES DANIEL, alias WILLIE JAMES TYLER, alias WILL TYLER, alias ALPHA STEPHENS, with the offense of MURDER for that the said FRANCES NORWOOD ROSS, EDNA MATHIS, JO ANN NORWOOD, DELORIS McPHERSON, and ALPHA OTIS O'DANIEL STEPHENS, alias ALPHA OTIS DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY BOY STEPHENS, alias JAMES DANIEL, alias WILLIE JAMES TYLER, alias WILL TYLER, alias ALPHA STEPHENS in the County and State aforesaid, on the 18th day of May in the year of our Lord Nineteen Hundred and Seventy-Three did unlawfully and with malice aforethought kill one MISS LOUISE MERCER, a human being, by shooting the said MISS LOUISE MERCER with a certain pistol, contrary to the laws of said State, the good order, peace and dignity thereof.

SPECIAL PRESENTMENT:

Beverly B. Hayes

BEVERLY B. HAYES
DISTRICT ATTORNEY

TWIGGS SUPERIOR COURT
OCTOBER TERM, 1974

-381- A PORTION OF STATE'S EXHIBIT C

PLEA OF DEFENDANT WITH COUNSEL

The defendant(s), [illegible] being represented by the undersigned attorney(s), waives/demands copy of special presentment and list of witnesses, waives dismiss being formally arraigned, and pleads [illegible] Copy of Special Presentment and List of Witnesses received.

This 17th day of OCTOBER, 19[illegible]

Beverly B. Hayes, District Attorney

Defendant

Defendants Attorney

The defendant(s), _____

being represented by the undersigned attorney(s), waives/demands copy of special presentment and list of witnesses, waives/demands being formally arraigned, and pleads _____ Copy of Special Presentment and List of Witnesses received.

This _____ day of _____ 19____

Beverly B. Hayes, District Attorney

Defendant

Defendants Attorney

No. 5

THUGGS Superior Court

OCTOBER Term, 19 74

THE STATE

vs.

FRANCES NORWOOD ROSS, ERMA MATHIS, JO ANN NORWOOD, DELORIS McPHERSON, and ALIFA OTIS ODANIEL STEPHENS, alias [illegible] DANIEL STEPHENS, alias ALFRED STEPHENS, alias SONNY LEE STEPHENS, alias JAMES DANIEL, alias WILLIE JAMES [illegible], alias WILL TYLER, alias ALPHA STEPHENS,

COUNT I -- ARMED ROBBERY

COUNT II -- MURDER

Bill

This 25 day of October 1974

Foreman

Prosecutor

BEVERLY B. HAYES
District Attorney

WITNESSES FOR THE STATE:

SEE ATTACHED LIST OF WITNESSES

WITNESSES APPEARING BEFORE THE GRAND JURY:

VERDICT

We, the jury, find the defendant, _____

This 25th day of October 1974

Foreman

384 A PORTION OF STATE'S EXHIBIT C

SPECIAL PRESENTMENT

GEORGIA, TWIGGS COUNTY:

IN THE SUPERIOR COURT OF SAID COUNTY

The Grand Jurors, selected, chosen and sworn for the County of TWIGGS term,

1. HUGH GLENN DYKES, Foreman
2. F. G. BLOUNT
3. WASHINGTON SINCLAIR
4. BUNYON FAULK
5. SPURGEON W. SIMMONS
6. MARK W. FITZPATRICK
7. FRED LARSEN
8. MYRTLE H. RAWLINS
9. S. M. GALLEMORE
10. WILFRED SOLOMON EMORY
11. GERALDINE C. CRUBBS
12. IAN JEROME HASTY
13. STEPHEN H. HANNICK
14. DOYLE L. STONE, Sr.
15. TOMMY E. SMITH
16. BERTHA MAE EASON
17. MYRON J. WARREN
18. JEROME L. NEWBY, III
19. CHARLOTTE CARINESS
20. DAN S. FAULK
21. BENNIE F. JOHNSON, JR.
22. MILDRED CLARKE BURNS
23. LILLIE GRACE EASON,

In the name and behalf of the citizens of Georgia, charge and accuse PAUL NEELEY and ALPHA OTIS ODANIEL STEPHENS, alias SONNY BOY STEPHENS, and alias ALFRED STEPHENS of the County and State aforesaid, with the offense of BURGLARY

for that the said PAUL NEELEY and ALPHA OTIS ODANIEL STEPHENS, alias SONNY BOY STEPHENS, and alias ALFRED STEPHENS in the County aforesaid, on the 13th day of April, in the year of our Lord Nineteen Hundred and Seventy-Three, with force and arms, did unlawfully and without authority and with intent to commit a theft therein, enter the dwelling house of Josh Wimberly, and did commit a theft therein, the value of said property exceeding a value of $100.00, all contrary to the laws of said State, the good order, peace and dignity thereof.

SPECIAL PRESENTMENT

Beverly B. Hayes

BEVERLY B. HAYES, DISTRICT ATTORNEY

TWIGGS SUPERIOR COURT
APRIL TERM, 1973

Stephens 3 yrs - Concurrent to 14

Neeley 3 yrs.

-386- A PORTION OF STATE'S EXHIBIT H

No. 15

PLEA OF DEFENDANT WITH COUNSEL

The defendant, ALTHA OTIS DANIEL STEPHENS, alias SONNY BOY STEPHENS being represented by the undersigned attorney, waives/demands copy of special presentment and the list of witnesses, waives/demands being formally arraigned and pleads GUILTY. Copy of Special Presentment and List of Witnesses received.

This 16th day of November, 19 23

Beverly B. Hayes, District Attorney

Defendant

Defendant's Attorney

PLEA OF DEFENDANT WITHOUT COUNSEL

The defendant, _____, appearing by his own choice without counsel acknowledges that the Judge of the Court has fully advised him of his right to counsel at all stages of the case against him, acknowledges that the Judge has offered and does now offer to appoint an able attorney to act as counsel for defendant, and the defendant has refused to accept the services of such counsel and now so refuses and the defendant, so refusing to have counsel represent him and so refusing to have counsel advise him, does hereby waive copy of Special Presentment and List of Witnesses, does hereby waive formal arraignment, and pleads

This _____ day of _____ 19____

Beverly B. Hayes, District Attorney

Defendant

No. 15

THUGGS Superior Court

APRIL Term, 19 23

THE STATE

vs.

PAUL NEELY, and ALTHA OTIS DANIEL STEPHENS alias SONNY BOY STEPHENS, and alias ALFRED STEPHENS.

BURGLARY

Filed in office this 16th day of November, 1923

Deputy Clerk, Superior Court

Solicitor, Superior Court

Atlanta Judicial Circuit

Solicitor-General, Atlanta Judicial Circuit

Atlanta, Ga., November 16, 1923.

BEVERLY B. HAYES
District Attorney

WITNESSES FOR THE STATE

Josh Wimberly, Jeffersonville, Georgia
Sheriff Earl Hamrick
Mrs. Jack Jones
Bay Branch, Georgia

WITNESSES APPEARING BEFORE THE GRAND JURY

VERDICT

We, the Jury, find the defendant, _____

This _____ day of _____ 19____

Foreman

387-A PORTION OF STATE'S EXHIBIT H

30784. STEPHENS v. THE STATE.

HALL, Justice.

Alpha Otis O'Daniel Stephens was convicted of murder in the Superior Court of Bleckley County on January 20-21, 1975, and sentenced to death. The conviction and sentence are before this court on appeal and for mandatory review of the death sentence.

I. Factual Summary

Stephens escaped from the Houston County, Georgia, jail and sometime thereafter on August 21, 1974, went to the home of Charles Asbell in Twiggs County allegedly accompanied by another man. Charles Asbell was not at home at the time and Stephens broke into the house wherein he located a .357 magnum pistol, which he loaded, and a number of other weapons, which he placed in a 1972 Dodge.

While the burglary was proceeding, Roy Asbell, Charles Asbell's father, drove up in his Ford Ranchero. Stephens' later statement to officers was that Asbell said, "What are you niggers doing in my house?", and seeing rifles in Stephens' automobile, pulled his gun. Stephens ran to Asbell's car, jerked Asbell out of the car, and hit him in the face several times. Asbell begged not to be hit any more. Stephens is 6 feet, 2 inches tall, while Asbell was 5 feet, 6 inches, and at that time Asbell was crippled as the result of a tractor accident. Asbell usually carried several hundred dollars on his person, and when he offered Stephens money in exchange for his life, Stephens took the offered money and kicked Asbell again.

Stephens hit Asbell with the pistol, knocking him back into the Ranchero and told his alleged partner to kill him if he moved. They drove approximately three miles to a

pasture, where they stopped and Asbell got out of the car and tried to escape. He hobbled to an abandoned building being used as a barn, but Stephens took the .357 magnum and ran after him. He took more money from Mr. Asbell and then placed the pistol in his ear and fired twice. Both bullets passed through Asbell's skull and exited at his right temple, causing his death. An autopsy showed that he sustained a broken jaw and several skull fractures.

A trail of evidence connected Stephens to the crime. In pre-trial statements to police, he confessed this crime fully, as well as a string of other serious crimes which he committed after his escape and before the Asbell murder. He presented no defense at trial. During the hearing on sentence, however, he testified that his partner fired the fatal shots.

II. Enumeration of Errors

Although Stephens alleges 14 enumerations of error, he argued only the unconstitutionality of the death penalty. The other enumerations would normally be considered abandoned pursuant to Rule 18 (c)(2) of this court (*Lynch v. State*, 234 Ga. 446, 449 (216 SE2d 307) (1975)), but because this is a death case, this court has carefully studied the enumerations. Our conclusion is that no reversible error has been made to appear by any enumeration. We will consider in more detail, as a part of our sentence review, the allegation that the voir dire testimony was not transcribed.

Stephens attacks the constitutionality of the 1973 death penalty procedure as set forth in Code Ann. §§ 27-2534.1 and 27-2737 (Ga. L. 1973, p. 159 et seq.) because of the discretion it allows in deciding whether or not death should be imposed. This issue was addressed by this court

in the first case decided under the statute (*Coley v. State*, 231 Ga. 829 (204 SE2d 612) (1973)), wherein we determined that the statute is not unconstitutional because it provides for rational discretion and evenhanded justice in narrowing the guidelines under which the penalty may be adjudged. No matter presented by Stephens convinces us to change that determination of constitutionality. See also *McCorquodale v. State*, 233 Ga. 369 (211 SE2d 577) (1974); *House v. State*, 232 Ga. 140 (3) (205 SE2d 217) (1974); *Eberheart v. State*, 232 Ga. 247 (1) (206 SE2d 12) (1974).

III. Sentence Review

We have reviewed the sentence as required by Code Ann. § 27-2537 (c) (1-3) (Ga. L. 1973, p. 159 et seq.), as we did in *Coley v. State*, supra, and in each subsequent case involving the death penalty under this statute. In *Ross v. State*, 233 Ga. 361 (211 SE2d 356) (1974) and in *Owens v. State*, 233 Ga. 869 (214 SE2d 173) (1975), we recognized the need for this court to review the voir dire examination to determine whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, in cases where potential jurors were excused for conscientious scruples against imposition of the death penalty. We must determine if the standards of jury selection applicable in death cases were met as required by Witherspoon v. Illinois, 391 U. S. 510 (88 SC 1770, 20 LE2d 776) (1968), as amplified in Boulden v. Holman, 394 U. S. 478 (89 SC 1138, 22 LE2d 433) (1908), and Maxwell v. Bishop, 398 U. S. 262 (90 SC 1578, 26 LE2d 221) (1969). We permitted supplementation of the trial transcript in *Coker v. State*, 234 Ga. 555 (216 SE2d 782) (1975) to the extent of establishing that no jurors had been excused for conscientious objection to capital punishment. We reach the same decision in this case, where the

voir dire was not transcribed at the time of trial and the trial court supplemented the record pursuant to Code Ann. § 6-805 (d) and (f). The supplement establishes that no prospective juror was excused for cause because he was opposed to the imposition of capital punishment. Although our consideration was not limited to this issue alone, we conclude that the sentence of death imposed here was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

We have considered the aggravating circumstances found by the jury and the evidence concerning the crime introduced in court. The jury found the following statutory aggravating circumstances: (1) The murder was committed by a person with a prior record of conviction for a capital felony; the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions. Code Ann. § 27-2534.1 (b) (1). (2) The murder was committed by a person who has escaped from the lawful custody of a peace officer and place of lawful confinement. Code Ann. § 27-2534.1 (b) (9).

In *Arnold v. State*, 236 Ga. 534, 542 (1976), we held that "the portion of Code Ann. § 27-2534.1 (b) (1), which allows for the death penalty where a 'murder (is) committed by a person who has a substantial history of serious assaultive convictions,' is unconstitutional and, thereby, unenforceable." In *Arnold*, that was the sole aggravating circumstance found by the jury. In this case, the evidence supports the jury's findings of the other statutory aggravating circumstances, and consequently the sentence is not impaired.

Stephens argues that under the state's new death penalty statute, there is no meaningful basis for distinguishing the few cases in which death is imposed from the

many cases in which it is not, and this was the flaw invalidating the statute in Furman v. Georgia, 408 U. S. 238 (92 SC 2726, 33 LE2d 346) (1972). We cannot agree. In performing the sentence comparison required by Code Ann. § 27-2537 (c) (3), this court uses for comparison purposes not only similar cases in which death was imposed, but similar cases in which death was not imposed. One result of this comparison was shown in *Coley v. State*, 231 Ga. 829, supra, p. 835, in which we ruled that on the facts of that rape case, death was disproportionate to the life penalties imposed by juries confronted with similar circumstances in other rape cases; and another in *Gregg v. State*, 233 Ga. 117, 127 (210 SE2d 659) (1974), in which we ruled similarly that death for armed robbery was disproportionate. A further description of the method by which sentence comparisons are made appears in *Ross v. State*, 233 Ga. 361, 364-367 (211 SE2d 356) (1974). Stephens' contention is without merit.

We have compared the evidence and sentence in this case with similar cases contained in the appendix attached to this opinion. Alpha Otis O'Daniel Stephens' sentence to death for murder is not excessive nor disproportionate to the penalty in similar cases considering both the crime and the defendant.

Judgment affirmed. All the Justices concur, except Gunter, J., who dissents.

ARGUED JULY 12, 1976—DECIDED JULY 14, 1976.

Murder. Bleckley Superior Court. Before Judge O'Connor.

Hugh Lawson, for appellant

Albert D. Mullis, District Attorney, Arthur K. Bolton, Attorney General, Harrison Kohler, Staff Assistant Attorney General, for appellee.

Appendix

Similar cases considered by the court: *Henderson v. State*, 227 Ga. 68 (179 SE2d 76) (1970); *Pass v. State*, 227 Ga. 730 (182 SE2d 779) (1971); *Watson v. State*, 229 Ga. 787 (194 SE2d 407) (1972); *Callahan v. State*, 229 Ga. 737 (194 SE2d 431) (1972); *Sirmans v. State*, 229 Ga. 743 (194 SE2d 476) (1972); *Scott v. State*, 230 Ga. 413 (197 SE2d 338) (1973); *Whitlock v. State*, 230 Ga. 700 (198 SE2d 865) (1973); *Kramer v. State*, 230 Ga. 855 (199 SE2d 805) (1973); *Bennett v. State*, 231 Ga. 458 (202 SE2d 99) (1973); *Howard v. State*, 231 Ga. 186 (200 SE2d 755) (1973); *Hunter v. State*, 231 Ga. 494 (202 SE2d 441) (1973); *Morgan v. State*, 231 Ga. 280 (201 SE2d 468) (1973); *House v. State*, 232 Ga. 140 (205 SE2d 217) (1974); *Gregg v. State*, 233 Ga. 117 (210 SE2d 659) (1974); *Floyd v. State*, 233 Ga. 280 (210 SE2d 810) (1974); *Chenault v. State*, 234 Ga. 216 (215 SE2d 223) (1975); *Smith v. State*, 236 Ga. 12 (222 SE2d 308) (1976); *Mason v. State*, 236 Ga. 46 (222 SE2d 339) (1976).

On Motion for Rehearing

Hall, Justice.

The foregoing opinion and judgment were vacated on June 29, 1976 and the case was scheduled for oral argument on July 12, 1976, pursuant to the representations made to this court by counsel for appellant that he did not receive a copy of our February 1976 oral argument calendar showing the scheduling of his case for argument, and did not intentionally waive argument by failing to appear.

Subsequent to our June 29 action, the United States Supreme Court, on July 2, 1976, upheld the constitutionality of the Georgia capital punishment statute against just the kinds of attacks appellant raised on this appeal. Gregg v. Georgia, ____ U. S. ____ (No. 74-6257, decided July 2, 1976). At oral argument on July 12, 1976, after conceding the impact of Gregg upon his arguments, counsel for appellant urged for our consideration only one point – that during voir dire one juror was improperly excused.

The trial record, as supplemented pursuant to Code Ann. § 6-805 (d) and (f), reflects that this juror was struck by the state's using one of its peremptory strikes. Even if the questioning of this juror had been defective under Witherspoon v. Illinois, 391 U. S. 510 (88 SC 1770, 20 LE2d 776) (1968), error would not result because the juror was not excused for cause.

No reason appearing which would call into question our opinion and judgment entered in this case on June 10, 1976, the same are reinstated.

Opinion and judgment reinstated. All the Justices concur, except Gunter, J., who dissents.

33487. STEPHENS v. HOPPER.

PER CURIAM.

The appellant, Alpha Otis O'Daniel Stephens, was convicted of murder in the Superior Court of Bleckley County in January of 1975 and sentenced to death. The conviction and sentence were affirmed in *Stephens v. State*, 237 Ga. 259 (227 SE2d 261) (1976). In April of 1977, he filed a petition for writ of habeas corpus in the Tattnall Superior Court attacking his death sentence on various

constitutional and statutory grounds. The Tattnall Superior Court denied his petition for habeas relief. We granted his application to appeal.

A brief review of the facts and circumstances surrounding the appellant's conviction of murder and sentence to death is necessary to an understanding of the arguments made in his habeas corpus petition.

In August of 1974, the appellant was serving concurrent three-year sentences under multiple convictions for burglaries committed by the appellant in April of 1973. He was being held in the Houston County jail, from which he escaped on August 19th. Before being apprehended on August 22nd, the appellant, in addition to committing a prior armed robbery and burglary, broke into the home of Charles Asbell in Twiggs County and proceeded to burglarize it. As the burglary was under way, Roy Asbell, Charles Asbell's father, drove up. The appellant approached Asbell with a pistol and forced him out of the car. He hit Asbell in the face several times and took several hundred dollars from him. The appellant then hit Asbell with the pistol and forced him back into the car. He drove Asbell approximately three miles, across the county line into Bleckley County, and killed him there by shooting him twice in the head.

In October of 1974, the appellant pleaded guilty in the Superior Court of Twiggs County to an indictment accusing him of committing an armed robbery and a murder in May of 1973. He also pleaded guilty to indictments accusing him of the following offenses arising from the criminal episode at the Asbell residence: one count of burglary, one count of motor vehicle theft, one count of armed robbery, and one count of kidnapping with bodily injury. The count of the indictment charging him with

kidnapping with bodily injury alleged that the appellant, "did unlawfully and with force and arms abduct and steal away Roy Asbell, a person, without lawful authority, and held Roy Asbell against his will and did physically abuse and did inflict and cause bodily injury to the body of Roy Asbell by beating, hitting and kicking Roy Asbell *and did threaten to kill Roy Asbell and then did kill Roy Asbell by shooting Roy Asbell . . .*" (Emphasis supplied.)

The appellant pleaded guilty to the kidnapping-with-bodily-injury indictment in Twiggs County, and he was given a sentence of life imprisonment. He was then placed on trial for the murder of Roy Asbell in Bleckley County. The jury imposed the death penalty, finding as statutory aggravating circumstances: (1) that the offense of murder was committed by a person with a prior record of conviction of a capital felony, Code Ann. § 27-2534.1 (b) (1); (2) that the murder was committed by a person who has a substantial history of serious assaultive criminal convictions, Code Ann. § 27-2534.1 (b) (1), supra; and, (3) that the offense of murder was committed by a person who had escaped from the lawful custody of a peace officer or a place of lawful confinement, Code Ann. § 27-2534.1 (b) (9). Although noting that in *Arnold v. State*, 236 Ga. 534 (7) (224 SE2d 386) (1976) that portion of Code Ann. § 27-2534.1 (b) (1) which authorizes the death penalty where a murder is committed by a person who has a substantial history of serious assaultive convictions had been struck down as unconstitutionally vague, this court affirmed the appellant's death sentence in *Stephens v. State*, supra, as the evidence supported the jury's finding of other statutory aggravating circumstances.

1. In the first enumeration of error, the appellant argues that in view of the allegations of homicide in the

Twiggs County kidnapping-with-bodily-injury indictment, it became necessary for the state to prove that the kidnap victim was killed; therefore, so this argument proceeds, the appellant's subsequent trial, conviction, and sentence for murder in Bleckley County were barred by state and federal constitutional guarantees ensuring due process and prohibiting double jeopardy.

Both the substantive and procedural aspects of this double jeopardy argument are controlled adversely to the appellant by our recent decision in *Potts v. State*, 241 Ga. 67 (11) (243 SE2d 510) (1978).

The starting point for an analysis for any double jeopardy question in this state must begin with Code Ann. §§ 26-505 through 26-507 (Ga. L. 1968, pp. 1249, 1267) and the seminal decision interpreting these statutory provisions, *State v. Estevez*, 232 Ga. 316 (206 SE2d 475) (1974). *Estevez* recognizes that these provisions of the 1968 Georgia Criminal Code provide new, expanded statutory tests for determining double jeopardy questions, thereby rendering inapplicable previous Georgia decisions applying only minimum constitutional standards of double jeopardy. These statutory provisions distinguish between two aspects of double jeopardy—first, limitations upon multiple prosecutions for crimes arising from the same conduct (referred to as the *procedural* bar of double jeopardy); and, second, limitations upon multiple convictions or punishments that may be imposed for such crimes (referred to as the *substantive* bar of double jeopardy).

As to the *procedural* bar of double jeopardy, Code Ann. § 26-506 requires all crimes arising from the same conduct to be prosecuted in a single prosecution provided they are in the same jurisdiction and are known to the prosecutor

unless the court in the interest of justice orders separate trials. Code Ann. § 26-507 sets out in detail when a second prosecution is barred. A prosecution is not barred within the meaning of Code Ann. § 26-507, "if the former prosecution was before a court which lacked jurisdiction over the accused or the crime." Id., subsection (d) (1).

In the present case, it is undisputed that the appellant kidnapped Roy Asbell in Twiggs County, inflicted bodily injury upon him in that county, and then abducted him to Bleckley County and killed him there. As a result, these two offenses were not within a single court's jurisdiction and could not have been tried together. Therefore, there was no procedural bar to the appellant's subsequent prosecution for the murder of Roy Asbell in Bleckley County. *Potts v. State*, supra, 241 Ga. at pp. 77-78.

As to the *substantive* bar of double jeopardy, Code Ann. § 26-506 (a) (1) provides that when the conduct of an accused may establish the commission of more than one crime, the accused may be *prosecuted* for each crime, but he may not be *convicted* of more than one crime, if one crime is included in the other. Code Ann. § 26-505 (a) and (b) provide alternative rules for determining when one crime is included in another. A crime is so included if "[i]t is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged" (Code Ann. § 26-505 (a)), or "[i]t differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission" (Code Ann. § 26-505 (b)). Code Ann. § 26-505 (a) sets out the rules for determining included crimes as a matter of fact, and Code Ann. § 26-505 (b) sets out the

rules for determining included crimes as a matter of law. *Estevez v. State*, supra, 232 Ga. 316.

In *Potts*, supra, we held that murder and kidnapping with bodily injury are not included crimes as a matter of law, citing *Pryor v. State*, 238 Ga. 698, 701 (234 SE2d 918) (1977). However, Potts argued that his murder conviction was included in his kidnapping-with-bodily-injury conviction as a matter of fact, since the kidnapping-with-bodily-injury indictment alleged as the bodily injury the killing of the victim. This is the precise argument the appellant makes in this case. In *Potts* we rejected the argument that the murder charge was, therefore, established by proof of the same or less than all of the facts required to establish the commission of kidnapping-with-bodily-injury charge. We rejected this argument because the state, in order to establish the kidnapping-with-bodily-injury charge, had to prove an unlawful abduction of the victim against his will, which did not have to be proved in order to establish the murder charge; and, in order to establish the murder charge, the state had to prove malice aforethought, which did not have to be proved in order to establish the kidnapping-with-bodily-injury charge. In other words, we held that murder and kidnapping with bodily injury were not included as a matter of fact under the first prong of Code Ann. § 26-505 (a), since these crimes have distinct elements. The first enumeration of error is without merit.

2. In the second enumeration of error, the appellant argues that the failure of the court reporter to transcribe the closing arguments of counsel renders the subsequently imposed death penalty unconstitutional.

It is true that improper statements made by the prosecutor in his closing argument to the jury can cause the

death penalty to be set aside. See *Prevatte v. State*, 233 Ga. 929 (214 SE2d 365) (6) (1975). Therefore, even though not required by statute (Code Ann. § 27-2401), closing arguments of counsel should be taken down in a case in which the state is seeking the death penalty. We are unable, however, to accept the proposition that the failure to transcribe the closing arguments of counsel requires the death penalty automatically to be set aside.

In the present case, it appears as though the closing arguments of counsel were recorded by the court reporter. However, the appellant's trial counsel were informed by the trial judge that it was the practice in that judicial circuit not to transcribe the closing arguments of counsel absent a request from either the state or the defendant. Neither counsel for the state nor counsel for the defendant requested that closing arguments be transcribed. Trial counsel were, however, further informed by the trial judge that if they had any objections to the district attorney's closing argument, the objectionable portion of the argument would be transcribed. No objections were made. An affidavit of the trial judge was received at the habeas corpus hearing, and in that affidavit the trial judge stated that: "In his closing argument, [the district attorney] factually summarized the evidence in the case. He made no allusions to race, nor did he use any epithet in referring to [the appellant]. I recall no statement by [the district attorney] that was inflammatory or that injected passion or prejudice into the trial of [the appellant]." One of the appellant's trial counsel testified at the habeas corpus hearing, and he did not claim that the district attorney stated anything objectionable in closing argument. During oral argument before this court appellate counsel was not aware of anything objectionable stated by the district attorney during closing argument

at trial.

We find this enumeration of error to be without merit, primarily because the appellant has failed to demonstrate any harm or prejudice resulting from the failure of the court reporter to transcribe closing arguments. See *Robinson v. State*, 229 Ga. 14 (189 SE2d 53) (1972). See also *Sims v. Smith*, 228 Ga. 136 (184 SE2d 347) (1971).

3. In the third enumeration of error, the appellant argues that the death penalty must be set aside because the trial court's instructions to the jury were in violation of *Fleming v. State*, 240 Ga. 142 (7) (240 SE2d 37) (1977), in that the jurors were not clearly informed that they had the authority to impose a life sentence even though they found the existence of statutory aggravating circumstances.

Although the alleged failure of this charge to comply with the sentencing portion of our capital punishment statute (Code Ann. § 27-2534.1) claims a substantial denial of rights under Georgia law and thereby asserts a claim cognizable on habeas corpus (Code Ann. § 50-127 (1)), nonetheless the state argues that the failure of the appellant to object to the charge at trial constitutes a waiver and precludes him from raising the issue in habeas corpus proceedings. This argument raises the question whether sentencing charges on death cases will be reviewed by this court on habeas corpus when not preserved by proper objection.

The general rule is that jury charges are not reviewable on habeas, although a charge which is so defective as to render the trial fundamentally unfair is reviewable in habeas corpus proceedings (*Byrd v. Hopper*, 234 Ga. 248 (215 SE2d 251) (1975)), even though unobjected to at trial. *Parrish v. Hopper*, 238 Ga. 468 (233 SE2d 161)

(1977). This court always has the *power* to review charges whether objected to or not. *Parrish v. Hopper*, supra, and concurring opinion of Justice Hall.

We conclude that in a death case the sentencing charge is so crucial to the outcome of the trial that we will exercise our power to review those charges when the issue is placed before us on habeas, whether objection was made in the trial court or not.

Considering on the merits the charge given Stephens' jury in the sentencing phase, we find that the jurors were actually informed of their responsibility under the death penalty statute, as required by *Fleming*, supra, and *Hawes v. State*, 239 Ga. 630 (238 SE2d 418) (1977), as well as our more recent decision in *Spivey v. State*, 241 Ga. 477 (1978). The charge was not erroneous.

4. In the fourth enumeration of error, the appellant argues that one of the statutory aggravating circumstances under which the death penalty was imposed was improperly invoked by the state.

The statutory aggravating circumstance complained of is found in Code Ann. § 27-2534.1 (b)(1), which provides in pertinent part that "[t]he offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony . . ." The appellant argues that at the time he committed the murder of Roy Asbell he did not have a "prior record of conviction for a capital felony." Although the appellant was convicted of a murder and two armed robberies committed prior to the date that he murdered Roy Asbell, these convictions were not obtained until after the murder of Roy Asbell was committed.

This argument raises the question whether, in deciding if the the [*sic*] appellant has "a prior record of conviction for a

capital felony" the jury should consider his record as of the moment of the crime or as of the time of sentencing. We conclude the latter was intended by the legislature, and at the time of his sentencing Stephens' jury could correctly find that he had such a record. To conclude otherwise would produce the intolerable result that an offender with no prior record could commit numerous separate murders one after the other before being apprehended, and then, at the trials for those murders, could *never* receive death under this aggravating circumstance even though convicted of each and every one of the murders.

The evidence supports this aggravating circumstance.

5. Finally, the appellant argues that since, under *Arnold v. State*, 236 Ga. 534, supra, one aggravating circumstance found by the jury is unconstitutionally vague, the death penalty cannot stand, because presenting evidence to the jury to support that invalid aggravating circumstance was prejudicial error.

The evidence introduced by the state was the appellant's criminal record. Code Ann. § 27-2503 (b) (Ga. L. 1974, pp. 352, 357) provides in part: "In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section." Under Code Ann. § 27-2503 (a), the record of any prior criminal convictions of the defendant, if made known to the defendant prior to his trial, is admissible. The record of the appellant's prior criminal convictions was, therefore, admissible in the penalty phase of this

trial. This final enumeration of error is without merit.

Judgment affirmed. All the Justices concur, except Undercofler, P. J., who concurs specially, Hill, J., who also concurs in the judgment, except that as to Divisions 1 and 4 he concurs in the judgment only, and Marshall, J., who concurs specially as to Division 1 and dissents as to Division 4.

ARGUED MAY 8, 1978—DECIDED JULY 6, 1978—
REHEARING DENIED JULY 20, 1978.

Habeas corpus. Tattnall Superior Court. Before Judge Harvey.

James C. Bonner, Jr., Hugh Lawson, for appellant.

Arthur K. Bolton, Attorney General, Harrison Kohler, Assistant Attorney General, for appellee.

UNDERCOFLER, Presiding Justice, concurring specially.

I believe Division 1 of the majority opinion can be stated more concisely as follows:

1. Separate prosecutions for crimes arising from the same criminal transaction are barred generally. They are not barred where the court lacks jurisdiction or the court orders separate trials in the interest of justice. Code Ann. § 26-506 (b) (c).

2. Separate punishment (conviction) of a crime is barred where it is included as a matter of law in another crime for which the defendant has been convicted. Crimes are included as a matter of law by statute or judicial decisions.

3. Separate punishment (conviction) of a crime is barred when it was included as a matter of fact in proving another crime for which the defendant has been convicted.

(a) When the elements of the separate crimes have been proved by additional and distinct facts, the crimes are not included as a matter of fact and the defendant may be convicted of both crimes. In such case, the proof may overlap in part, but the proof of either crime does not encompass the other. *Potts v. State*, 241 Ga. 67 (243 SE2d 510) (1978).

(b) When all, or less than all, the facts which were necessary to prove one crime are the only facts which proved the other crime the latter crime is included as a matter of fact and the conviction of the latter crime is barred. In such case, the proof of the included crime is encompassed by the proof of the other crime. *State v. Estevez*, 232 Ga. 316 (206 SE2d 475) (1974).

4. *Allen, Burke, Zilinmon, Williams* and *Pryor* are not inconsistent with *Potts*. The hypothetical case in *Pryor* should be disregarded.

MARSHALL, Justice, concurring specially as to Division 1 and dissenting as to Division 4.

1. I agree with the holding in Division 1 of the majority opinion that the appellant's substantive and procedural double jeopardy arguments are controlled adversely to him by our decision in *Potts*. However, I would add the following to what has been stated in Division 1 of the court's opinion.

I believe that our decision in *Potts* signaled a shift from the method of analysis previously used by this court in determining whether a crime is established by proof of the same or less than all the facts required to establish the commission of another crime, within the meaning of Code Ann. § 26-505 (a). In making this determination, *Estevez* and a line of cases following it (*Allen v. State*, 233 Ga. 200

(3) (210 SE2d 680) (1974); *Burke v. State*, 234 Ga. 512 (2) (216 SE2d 812) (1975); *Zilinmon v. State*, 234 Ga. 535 (8) (216 SE2d 830) (1975); *Williams v. State*, 238 Ga. 244 (7) (232 SE2d 238) (1977); *Pryor v. State*, 238 Ga. 698 (1) (234 SE2d 918) (1977)), look to the actual evidence introduced at trial. These cases hold, in effect, that if the state uses up all the evidence that the defendant committed one crime in establishing another crime, the former crime is included in the latter as a matter of fact under Code Ann. § 26-505 (a).

However, in *Potts*, we looked not to the actual evidence adduced at trial, but to the evidence required to establish each element of the crime, in determining whether two crimes are included under the first prong of Code Ann. § 26-505 (a).

Concededly, in the vast majority of cases, utilization of one or the other approach would produce the same result. However, the difference in the two approaches, albeit subtle, has the potential for producing drastically different results, as in *Potts* where it could have meant the difference between the affirmance or setting aside of a death sentence. For in *Potts* we held, correctly I believe, that even though the kidnapping-with-bodily-injury indictment alleged the killing of the victim as the bodily injury sustained, the offense of murder was not established by proof of less than all the facts required to establish the offense of kidnapping with bodily injury, since the state had to prove malice aforethought in order to convict the defendant of murder. However, as we are all aware, the element of malice aforethought, which must be present before a killing can constitute murder, can be either express or implied. The evidence of malice in *Potts* may well have been implied, in which case there would have been

no independent evidence of malice other than the circumstances surrounding the defendant's killing of the victim. In this latter event, under *Estevez* and its progeny, the evidence required to convict of kidnapping with bodily injury would have been the only evidence showing the defendant's murder of the victim; therefore, murder would have been included in the crime of kidnapping with bodily injury under Code Ann. § 26-505 (a).

Furthermore, under traditional double jeopardy analysis, the "distinct elements" test is the standard used in determining whether one crime is included in another as a matter of law. See Blockburger v. United States, 284 U. S. 299 (52 SC 180, 76 LE 306) (1932); Gavieres v. United States, 220 U. S. 338 (31 SC 421, 55 LE 489) (1911); Burton v. United States, 202 U. S. 344 (26 SC 688, 50 LE 1057) (1906). This is the test this court adopted in *Potts* for determining included crimes under the first prong of Code Ann. § 26-505 (a) as a matter of fact. In my opinion, continuing to speak of Code Ann. § 26-505 (a) as setting out the rules for determining included crimes as a matter of fact and Code Ann. § 26-505 (b) as setting out the rules for determining included crimes as a matter of law, becomes somewhat muddlesome. I would hold, quite simply, that the first prong of Code Ann. § 26-505 (a) establishes the "same evidence" test as one of several alternative tests for determining the limitations for multiple punishments for crimes arising from the same conduct of the accused, and Code Ann. § 26-507 adopts the "same transaction" test for determining limitations upon successive prosecutions for such crimes.

The "same evidence" test and the "same transaction" test are the predominant tests used by the courts in this country in resolving double jeopardy questions as a

matter of constitutional law. The great deal of confusion which has been engendered by the double jeopardy proscriptions of the Federal and State Constitutions is largely attributable to the fact that the courts have adopted either one or the other test for determining both substantive and procedural double jeopardy questions. In my opinion, the first prong of Code Ann. § 26-505 (a) adopts the "same evidence" test for the resolution of substantive double jeopardy questions, and Code Ann. § 26-507 adopts the "same transaction" test for the resolution of procedural double jeopardy questions. As to the procedural aspect of the double jeopardy bar, the 1968 Criminal Code thus extends to the accused more protection than the Constitution requires. Compare Brown v. Ohio, 432 U. S. 161 (97 SC 221, 53 LE2d 187) (1977) (Brennan and Marshall, JJ., concurring); Thompson v. Oklahoma, 429 U. S. 1053 (97 SC 768, 50 LE2d 770) (1977) and cits.

2. In Division 4, the appellant argues that one of the statutory aggravating circumstances under which the death penalty was imposed is not supported by the evidence. The statutory aggravating circumstances complained of is found in Code Ann. § 27-2534.1 (b) (1), which provides in pertinent part, that: "[t]he offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony. . ." The convictions of the appellant for other capital felonies were not obtained until after the appellant committed the murder of Roy Asbell. Therefore, the murder of Roy Asbell was not committed by a person with a prior record of conviction for a capital felony, as clearly specified in the statute. In holding that it was, a majority of this court violate the cardinal rule of statutory construction that where a statute is plain and susceptible

of but one natural and reasonable construction, the court has no authority to place a different construction upon it, but must construe it according to its terms. *Rayle Elec. Membership Corp. v. Cook*, 195 Ga. 734 (2) (25 SE2d 574) (1943); *State Revenue Comm. v. Brandon*, 184 Ga. 225, 228 (190 SE 660) (1937) and cits.; *Barnes v. Carter*, 120 Ga. 895, 898 (48 SE 387) (1904); *Ezekiel v. Dixon*, 3 Ga. 146, 158 (1847).

The majority arrive at this construction of the statute by envisioning a hypothetical situation in which an offender with no prior record commits numerous separate murders before being apprehended. The majority note that if we construe this statutory aggravating circumstances as referring to the defendant's record at the time the crime was committed, rather than at the time of the trial, the defendant in the hypothetical situation could not receive the death penalty (unless of course, another statutory aggravating circumstance was present). The majority deem this an "intolerable result" and, therefore, conclude that the legislature did not intend it. What the majority ignore is that another portion of Code Ann. § 27-2534.1 (b) (1) authorizing imposition of the death penalty where "[t]he offense of murder . . . was committed by a person . . . who has a substantial history of serious assaultive criminal convictions" would cover the hypothetical situation, had it not been for the fact that it was struck down by this court in *Arnold v. State*, supra. The majority construe the portion of Code Ann. § 27-2534.1 (b) (1) under review to mean neither what it says nor what the legislature intended it to mean. The majority construe it to mean what the legislature intended by the enactment of that portion of the statute struck down in *Arnold*. In so doing, I think that this court invades the province of the legislature. I respectfully dissent as to Division 4.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA

ALPHA OTIS O'DANIEL STEPHENS, *Petitioner,*	}	CIVIL NO.
vs.		
SUPERINTENDENT WALTER ZANT, *Respondent.*		_____

PETITION FOR A WRIT OF HABEAS CORPUS

Pursuant to 28 U.S.C. 2254 and the Rules governing such cases, Alpha Otis O'Daniel Stephens, by counsel, respectfully petitions this Court for a writ of habeas corpus directed to the Respondent.*

A. The Respondent is the Superintendent of the Georgia Diagnostic and Classification Center in Jackson, Georgia and there, within the jurisdiction of this Court, he is holding the Petitioner. [3] He holds the Petitioner, inter alia, under a sentence of death which [1] the Bleckley Superior Court pronounced upon him on [2] 21 January 1975 following his [6] jury trial and conviction after this [5] plea of not guilty to [4] an indictment for the murder of one Roy Asbill.

B. [7] The Petitioner testified in his own defense at trial.

C. [8] Following his conviction and sentence, the Petitioner took a direct appeal [9] to the Supreme Court of Georgia which, on 14 July 1976, affirmed the judgment,

*The figures in brackets refer to the specific paragraphs designated in the form approved for use in this District. For greater clarity, the order in which the information appears has been somewhat rearranged.

Stephens v. State, 237 Ga. 259, 227 S.E.2d 261, cert. den., 429 U.S. 986 (1976).

D. [10] Thereafter the Petitioner sought [11(a)(2)] a state writ of habeas corpus in [11(a)(1)] the Tattnall Superior Court [11(a)(3)] on the grounds that his conviction and sentence violated his rights under the Fifth and 14th Amendments not to be placed twice in jeopardy for the same offense, that they violated his rights under the Eighth and 14th Amendments not to be deprived of his life except upon due process of law and in proceedings free of arbitrary and capricious influences, that his sentence was infected by improper, prejudicial, and arbitrary influences, that his sentence was reviewed and sustained on an incomplete record which lacked the transcript of the prosecutor's arguments to the jury, and that his sentence rested in part upon an invalid basis.

E. [11(a)(4)] Following an evidentiary hearing, the Superior Court [11(a)(5)] dismissed the writ [11(a)(6)] on 14 December 1977. [11(d)] The State Supreme Court affirmed this judgment on appeal, *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92 (1978), cert. den., ____ U.S. ___ (27 November 1978). The State Supreme Court did not address a special enumeration of error directed toward the proportionality of the sentence in comparison to an earlier sentence for kidnapping.

F. (i) The Petitioner's conviction and sentence are void under the Fifth and 14th Amendments of the Constitution of the United States because they constitute double jeopardy.

(ii) The homicide for which the Petitioner stands convicted was the murder of Roy Asbill on 21 August 1974 evidently a short distance over the Twiggs-Bleckley county line. It culminated a series of crimes which the

Petitioner committed in Twiggs County during 20-21 August 1974.

(iii) Those crimes included the theft of Mr. Asbill's car, robbing him, and kidnapping him with bodily injury.

(iv) The Petitioner pleaded guilty to these charges in the Twiggs Superior Court on 17 October 1974. He was sentenced to various terms of imprisonment including life imprisonment for kidnapping. The Petitioner could have been, but was not, sentenced to death under his plea to the indictment for this crime. None of these convictions or sentences has been set aside.

(v) The kidnapping count alleged, by way of the aggravation necessary under Georgia Code Ann. 26-1311 in order to render the crime punishable by life imprisonment or death, that the Petitioner:

> "in the county aforesaid [Twiggs County] . . . held Roy Asbill against his will and did physically abuse and did inflict and cause bodily injury to [him] by beating, hitting, and kicking [him] and did threaten to kill . . . and then did kill Roy Asbill by shooting [him]."

(vi) When in January 1975 the Petitioner was tried, convicted, and sentenced to death in Bleckley County for murdering Roy Asbill, he had already been placed in jeopardy of his life for the very same homicide in the Twiggs Superior Court because:

> (a) The allegation of the Twiggs indictment constituted a felony-murder charge under Georgia law, that is, causing the homicide of Roy Asbill during the course of kidnapping him.
>
> (b) The Twiggs indictment, to which the Petitioner fully confessed, alleged venue of the homicide in Twiggs County and barred the State from later attempting to impeach its own charges by proof otherwise.

(c) The particular allegation of the Twiggs indictment specifically included the homicide as part of the bodily injury aggravating the kidnapping and thus incorporated his murder as an element of that offense.

G. (i) The Petitioner's death sentence stands in violation of his rights under the Eighth and 14th Amendments not to be deprived of his life except upon due process of law and except in proceedings not influenced by arbitrary and capricious considerations.

(ii) Although the Petitioner's jury was instructed that it must find at least one statutory aggravating circumstance before it could impose a death sentence, it was not instructed that even if it found such a circumstance it need not impose death.

(iii) Although no death sentence may constitutionally be imposed without safeguards which eliminate the capricious and arbitrary infliction of the penalty and which preclude passionate and prejudicial influences, the Petitioner's sentence was imposed, reviewed, and sustained without them and it was infected by improper and arbitrary influences.

(iv) For example, the sentence was reviewed and sustained on an incomplete record which omitted the voir dire of the jury and the prosecutor's arguments to the jury.

(v) And the jury set the sentence partially on the basis that the murder was committed by one with a substantial history of serious, assaultive convictions, a standard which the State Supreme Court has set aside as unconstitutionally vague.

(vi) The jury also set the sentence partially on the basis that the crime was committed by a person with a prior record of conviction for a capital felony, but in fact

the Petitioner had no such prior record at the time he committed the homicide.

(vii) The jury was not instructed that they must unanimously concur on each basis of the sentence and it is therefore impossible to determine whether a death sentence would have been imposed if the grounds in subparagraphs v and vi had not been considered.

H. The Petitioner's death sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment because it is disproportionate to the life sentence he received in Twiggs County for essentially the same offense.

I. [14] The Petitioner has no other legal action pending in court.

J. [15] The Petitioner's appointed counsel in the Twiggs proceedings was Maurice Byers, P.O. Box 952, Dublin, Georgia 31021. Hugh Lawson, 328 Commerce Street, Hawkinsville, Georgia represented him by appointment through the direct proceedings in the Bleckley case and thereafter in the collateral proceedings in the Tattnall Superior Court. Until his appointment to the position of District Attorney, Phillip West, P.O. Box 571, Eastman, Georgia was co-counsel with Mr. Lawson during the Bleckley trial. James C. Bonner, Jr., Prisoner Legal Counseling Project, 475 North Lumpkin Street, Athens, Georgia 30601 joined Mr. Lawson as co-counsel in the collateral proceedings.

WHEREFORE, the Petitioner respectfully requests that this Court grant the Petitioner the relief to which

he may be entitled and direct that his conviction for murder and his sentence of death be set aside.

/s/ HUGH LAWSON
Counsel for the Petitioner

/s/ JAMES C. BONNER, JR.
Counsel for the Petitioner

UNIVERSITY OF GEORGIA SCHOOL OF LAW
LEGAL AID AND DEFENDER SOCIETY
PRISONER LEGAL COUNSELING PROJECT
475 North Lumpkin Street
Athens, Georgia 30601

(404) 542-4241

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

ALPHA OTIS O'DANIEL STEPHENS, *Petitioner*, V. SUPERINTENDENT WALTER ZANT, Georgia Diagnostic & Classification Center, *Respondent.*	CIVIL ACTION NO. 79-30-MAC

JUDGMENT

Pursuant to the Ruling of this Court dated and filed May 11, 1979, and for the reasons stated therein, the petition for a writ of habeas corpus is denied.

This 11th day of May, 1979.

WALTER F. DOYLE, Clerk

By: /s/ HELEN F. NEWBERRY
HELEN F. NEWBERRY
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

ALPHA OTIS O'DANIEL STEPHENS, *Petitioner,* V. SUPERINTENDENT WALTER ZANT, Georgia Diagnostic & Classification Center, *Respondent.*	CIVIL ACTION NO. 79-30-MAC

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner Alpha Otis O'Daniel Stephens, a state prisoner under the death sentence for murder, seeks habeas corpus relief pursuant to 28 U.S.C.A. § 2254. Stephens was convicted and sentenced to death by the Bleckley County Superior Court and the verdict and sentence was affirmed by the Georgia Supreme Court. *Stephens v. State*, 237 Ga. 259, 227 S.E. 2d 261 (1976), *cert. denied*, 429 U.S. 986, 97 S.Ct. 508, 50 L.Ed. 2d 599 (1976). A prior state petition for habeas corpus was denied by the Tattnall County Superior Court, *Stephens v. Hopper*, No. 77-94 (Dec. 14, 1977), and this denial of relief was likewise affirmed by the Georgia Supreme Court, *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92 (1978), *cert. denied.*

On February 8, 1979 this court stayed the impending execution so that this petition might be heard and decided. The petitioner alleges as grounds for relief that (1) the murder conviction is violative of the double jeopardy clause of the Fifth Amendment, (2) the closing arguments of the district attorney which allegedly contained prejudicial remarks was [*sic*] not transcribed; and (3) the imposition of the death penalty is violative of the peti-

tioner's Eighth and Fourteenth Amendment rights. All these grounds have been presented to the state tribunals; consequently exhaustion of state remedies is not an issue.

The circumstance which lead [*sic*] to petitioner's murder conviction began on August 19, 1974 when Stephens escaped from the Houston County jail where he was being held on other escape charges. He stole a car and went to Macon, Georgia where he stole another car and committed a burglary. On August 21, 1974 he went to the residence of Charles Asbell in Twiggs County and began burglarizing the house. Among the items he took was a .357 magnum pistol. As Stephens and his accomplice were burglarizing the home, Charles Asbell's father, Roy Asbell, drove up and asked the two men what they were doing. The petitioner, armed with the pistol, assaulted Asbell by hitting and kicking him and took a large sum of money from him. The petitioner forced Asbell into his vehicle and drove him a short distance across the county line into Bleckley County where Stephens shot Asbell twice in the head, killing him. The petitioner drove Asbell's vehicle to Savannah and the next day was apprehended by Savannah police on other charges. He later confessed to a number of burglaries as well as the kidnapping and murder of Roy Asbell.

On October 14, 1974 the petitioner was indicted by the Twiggs County grand jury for the armed robbery and kidnapping-with-bodily-injury of Roy Asbell, as well as various burglary charges and the murder of one Louise Mercer. Among the assaultive acts alleged in connection with the kidnapping-with-bodily-harm charge was that Stephens shot and killed the victim. The petitioner pled guilty to all offenses and was sentenced to three consecutive life sentences as well as various other terms. In

November, Stephens was indicted by the Bleckley County grand jury for the murder of Roy Asbell. Following a plea of not guilty he was tried, convicted and sentenced. The death sentence was imposed after the jury found that the murder was committed by a person with a prior conviction for a capital felony, by a person with a prior history of serious assaultive criminal convictions and by a person who had escaped from the lawful custody of a peace officer and place of lawful confinement. *Ga. Code Ann.* § 27-2534.1(b). The Georgia Supreme Court set aside the death penalty on account of prior assaultive convictions but otherwise affirmed the conviction and death sentence. *Stephens v. State, supra.*

I. FORMER JEOPARDY

The petitioner argues that his guilty plea to kidnapping-with-bodily-harm (*Ga. Code Ann.* § 26-1311) in Twiggs County is a bar to prosecution for murder in Bleckley County on the grounds that the kidnapping and murder charges arose from the same acts and the homicide of Asbell was one of the acts of bodily harm in the kidnapping indictment. The Georgia Supreme Court rejected this argument reasoning that there was no procedural bar to the murder prosecution since Stephens could not be tried in Twiggs County for a murder that took place in Bleckley County. The court also held that there was no substantive bar to the prosecution because kidnapping-with-bodily-injury and murder are not included offenses and are established by the proof of different facts. *Stephens v. Hopper, supra.* This court defers to the Georgia Supreme Court's decision insofar as it rests on a construction of state law; however, this court must decide the question measured against the Fifth Amendment's double jeopardy prohibition.

The double jeopardy clause of the Fifth Amendment

provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This clause has been incorporated into the due process clause of the Fourteenth Amendment and constitutes a limitation of the states' power. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). As explained by the United States Supreme Court:

> " . . . where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."

Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306, 309 (1932). *See also Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), *United States v. Smith*, 574 F.2d 308 (5th Cir. 1978).

This court is convinced that the double jeopardy prohibition has not been violated. The kidnapping-with-bodily-harm and the murder charge are offenses defined by separate statutes with different elements. In Georgia, kidnapping-with-bodily-harm requires the prosecution to show that the defendant abducted another person without legal authority and held the person against his will and in addition requires that the victim have received bodily injury from the abduction. *Ga. Code Ann.* § 26-1311. Murder, on the other hand, is the unlawful taking of the life of another with malice aforethought. *Ga. Code Ann.* § 26-1101. Clearly then, the two offenses require proof of different facts and are not the same within the meaning of the Fifth Amendment. The petitioner, nevertheless, argues that because the killing of Asbell was included as one of the acts of bodily injury in the kidnapping indictment jeopardy attached with the petitioner's guilty plea. This

argument is without merit. The double jeopardy clause requires the court to examine the elements of the offenses and to determine what facts are necessary to sustain a conviction. Homicide is not a necessary element of kidnapping-with-bodily-injury. Furthermore, the kidnapping-with-bodily-injury charge was adequately supported by the allegations of beating, hitting, and kicking set forth in the indictment.

II. ABSENCE OF TRANSCRIPT OF DISTRICT ATTORNEY'S CLOSING ARGUMENT

The petitioner alleges that the district attorney made prejudicial remarks during the closing argument and that the court failed to have the argument transcribed. He alleges that the court failed to have the voir dire transcribed. At the state habeas hearing the respondent produced the affidavit of the trial judge who stated that at the time of the trial it was the practice of his circuit not to transcribe voir dire or arguments of counsel absent a request and that no request was made by either of petitioner's attorneys despite the fact both knew of the rule. The trial judge also stated that the district attorney "made no allusions to race nor did he use any epithet in referring to" the petitioner. He recalled no prejudicial or inflammatory statements.

The petitioner has failed to demonstrate any error that would form the basis for habeas relief.

III. THE DEATH PENALTY WAS NOT IMPOSED CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS

The United States Supreme Court has upheld Georgia's statutory scheme for the imposition of the death sentence

against a constitutional attack under the Eighth and Fourteenth Amendments. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). All the procedures set fo h in those statutes were observed in this case. The jury found beyond a reasonable doubt two statutory aggravating circumstances that the murder was committed by a person with a prior record for a conviction of a capital felony, *Ga. Code Ann.* § 27-2534.1(b)(1), and by a person who had escaped from lawful custody of a police officer. *Ga. Code Ann.* § 27-2534.1(b)(9). These findings are supported by the evidence and either finding is grounds for the imposition of the death sentence. On mandatory review to the Georgia Supreme Court, *Ga. Code Ann.* § 27-3537, the court held that the sentence was not the result of passion or caprice nor was the sentence "excessive or disproportionate to the penalty in similar cases considering both the crime and the defendant." This court must agree with these conclusions.

Accordingly, the petition for a writ of habeas corpus is hereby denied.

The stay of execution issued on February 8, 1979 shall remain in force and effect until such time as respondents move for dissolution on account of petitioner's failure to appeal or affirmance after appeal.

SO ORDERED, this 11th day of May, 1979.

/s/ WILBUR D. OWENS, JR.
WILBUR D. OWENS, JR.
United States District Judge

Alpha Otis O'Daniel STEPHENS,
Petitioner-Appellant,

v.

Walter ZANT, Superintendent,
Respondent-Appellee.

No. 79-2407.

United States Court of Appeals,
Fifth Circuit.

Nov. 26, 1980.

Appeal from the United States District Court for the Middle District of Georgia.

Before INGRAHAM, RONEY, and THOMAS A. CLARK, Circuit Judges.

RONEY, Circuit Judge.

Petitioner, convicted of murder and sentenced to death by the State of Georgia, appeals from a denial of a writ of habeas corpus. Petitioner contends his conviction violates the Double Jeopardy Clause and his sentence is invalid under the Eighth Amendment because closing arguments were not transcribed, the jury was not properly instructed that it could recommend a life sentence if it found aggravating circumstances, and the jury was permitted to consider an unconstitutional aggravating circumstance. Although we reject his other contentions, we agree that because the jury considered an unconstitutional aggravating circumstance, petitioner's death sentence cannot stand.

In August of 1974, petitioner escaped from jail where he was serving sentences for earlier burglary convictions. He committed a number of crimes in Twiggs County,

Georgia. While petitioner and an accomplice were burglarizing a house, Roy Asbell drove up in his car. Petitioner forced Asbell at gunpoint from the car, hit him several times in the face and took a large sum of money from him. Petitioner then forced Asbell back into the car and drove him approximately three miles, across the county line into Bleckley County. There, petitioner killed Asbell by shooting him twice in the head at close range.

Shortly thereafter petitioner was apprehended and was indicted by the Twiggs County grand jury for motor vehicle theft, armed robbery and kidnapping with bodily injury. Petitioner pleaded guilty in Twiggs Superior Court and was sentenced to ten years for motor vehicle theft and to life sentences for armed robbery and kidnapping.

Afterwards petitioner was indicted in Bleckley County for the murder of Roy Asbell, found guilty and sentenced to death. His conviction and sentence were affirmed on direct appeal to the Georgia Supreme Court. *Stephens v. State*, 237 Ga. 259, 227 S.E.2d 261, *cert. denied*, 429 U.S. 986, 97 S.Ct. 508, 50 L.Ed.2d 598 (1976). His state petition for a writ of habeas corpus was denied. *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92, *cert. denied*, 439 U.S. 991, 99 S.Ct. 593, 58 L.Ed.2d 667 (1978). Petitioner then sought a writ of habeas corpus in federal court, alleging the same constitutional flaws as were raised in state court. The district court denied relief. Petitioner appeals, his execution having been stayed pending appeal.

Petitioner asserts four errors in his conviction and sentence: (1) jeopardy for the murder charge attached when he pleaded guilty to the kidnapping charge and therefore his subsequent murder trial was constitutionally barred; (2) the court failed to transcribe closing arguments and *voir dire;* (3) the instruction to the jury did not adequately

charge that they could still impose life imprisonment even if they found aggravating circumstances that would justify the death sentence; and (4) when one of the three aggravating circumstances found by the jury was later declared unconstitutionally vague, the sentence should not have been affirmed on the basis of the other two.

I. DOUBLE JEOPARDY

The Twiggs County indictment for kidnapping recited that he killed the kidnap victim. The third count reads as follows:

COUNT III

> And the aforesaid Grand Jurors . . . charge and accuse Alpha Otis O'Daniel Stephens . . . with the offense of KIDNAPPING for that the said Alpha Otis O'Daniel Stephens . . . in the county aforesaid . . . did unlawfully and with force and arms abduct and steal away Roy Asbell, a person, without lawful authority, and held Roy Asbell against his will and did physically abuse and did inflict and cause bodily injury to the body of Roy Asbell by beating, hitting and kicking Roy Asbell and did threaten to kill Roy Asbell and then did kill Roy Asbell by shooting Roy Asbell, contrary to the laws of said State . . . .

Petitioner argues that by stating that in the course of the kidnapping he killed Asbell, the State unwittingly accused him of the crime of murder because the indictment alleged all the elements of murder. When he pled guilty under Count III of the Twiggs indictment, he admitted every fact averred in the indictment. At that point, his argument continues, he ran the risk—*i.e.*, was placed in jeopardy—of a conviction of murder under a felony—murder theory. Since under Georgia law felony murder and malice murder are different ways in which one offense

may be committed, *Leutner v. State*, 235 Ga. 77, 218 S.E.2d 820 (1975), he argues the State was barred by the Double Jeopardy Clause from prosecuting him for malice murder in Bleckley County.

The Supreme Court of Georgia responded to petitioner's argument by holding that malice murder and kidnapping are not the same in law or in fact and thus are not the same offense under state law. It also determined that the state legislature intended, under the test in Ga. Code Ann. §§ 26–505 to 507, to permit multiple prosecutions and punishments in a case such as this. *Stephens v. Hopper*, 241 Ga. at 598–600, 247 S.E.2d at 94–95. *Cf. Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) (holding that the Double Jeopardy Clause prohibits courts from imposing greater penalties than the legislature intended).

While this is the definitive interpretation of Georgia law and binding upon this Court, *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 1885, 44 L.Ed.2d 508 (1975), the holding does not adequately respond to petitioner's argument. Petitioner's contention is not that kidnapping and malice murder are the "same offense." Rather, he asserts that felony murder was charged in the indictment, that by pleading guilty he was placed in jeopardy of conviction for that crime and therefore the state is barred from any further attempt to prosecute him for murder.

[1, 2] Petitioner's contention that he was placed in jeopardy of a conviction for murder in Twiggs County is erroneous, because there was no jurisdiction in that county to try him for the homicide. The rule is absolute that a person is not put in jeopardy unless the court in which he was tried the first time had jurisdiction to try

him for the charge the person now seeks to avoid. The Supreme Court has twice spoken to the point.

> We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged.

Grafton v. United States, 206 U.S. 333, 345, 27 S.Ct. 749, 751, 51 L.Ed. 1084 (1907).

> An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense.

United States v. Ball, 163 U.S. 662, 669, 16 S.Ct. 1192, 1194, 41 L.Ed. 300 (1896).

The Georgia Constitution requires that, unless an impartial jury cannot be obtained, "all criminal cases shall be tried in the county where the crime was committed." Ga. Const. Art. VI, § XIV, ¶ VI (Ga. Code Ann. § 2-4306). The Supreme Court of Georgia specifically held in this case that the Twiggs County court did not have jurisdiction to try the murder offense. *Stephens v. Hopper*, 241 Ga. at 599, 247 S.E.2d at 95. The Fifth Circuit held in *Tennon v. Ricketts*, 574 F.2d 1243, 1245 (1978), *cert. denied*, 439 U.S. 1091, 99 S.Ct. 874, 59 L.Ed.2d 57 (1979), that "it is for the Georgia Supreme Court, not this Court, to expound the decisional rules of that, jurisdiction." *Accord*, *Hortonville Joint School District No. 1 v. Hortonville Education Assn.*, 426 U.S. 482, 488, 96 S.Ct. 2308, 2312, 49 L.Ed.2d 1 (1976); *Mullaney v. Wilbur*, 421 U.S. 684, 691, 95 S.Ct. 1881, 1885, 44 L.Ed.2d 508 (1975); *Eisenstadt v. Baird*, 405 U.S. 438, 441–42, 92 S.Ct. 1029, 1032, 31 L.Ed.2d 349 (1972) (all holding that the highest state court is the final authority on questions of state law and

federal courts are bound to accept its interpretation of state law).

[3] The question of the jurisdiction of a state trial court in a state criminal prosecution is clearly a question of state law, which binds this Court. Since the Twiggs Superior Court had no jurisdiction to hear the murder offense, petitioner was not placed in jeopardy of a murder conviction, under either a malice murder or felony murder theory, in the Twiggs County proceedings.

[4] Petitioner was, however, placed in jeopardy for the offense of kidnapping with bodily injury. The Double Jeopardy Clause bars a subsequent prosecution for any offense deemed the "same offense" under the test in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932).

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

The Supreme Court held in *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), that a lesser or greater included offense is the "same offense" for double jeopardy purposes. It thus becomes necessary to determine whether petitioner's murder conviction was for the "same offense" as his kidnapping charge.

[5] Malice murder and kidnapping with bodily injury have separate and distinct elements and require proof of different facts. Kidnapping consists of abducting another unlawfully and against his will, plus inflicting some bodily injury. Malice murder consists of killing another with malice aforethought. Thus, even if they involve the same transaction and considerably overlap each other factually,

they are not the "same offense" under *Blockburger*. In addition, as found by the Georgia Supreme Court, the Georgia legislature intended multiple punishment for kidnapping and malice murder in a case such as this. *Stephens v. Hopper*, 241 Ga. at 599–600, 247 S.E.2d at 95–96.

[6, 7] As felony murder is defined under Georgia law, the underlying felony is a lesser included offense of felony murder and thus the same offense under *Blockburger*. *See Young v. State*, 238 Ga. 548, 233 S.E.2d 750 (1977); *Reed v. State*, 238 Ga. 457, 233 S.E.2d 369 (1977). Once the State tried and convicted petitioner for kidnapping, it would be barred from prosecuting him for felony murder only if the underlying felony upon which that prosecution was based were that same kidnapping. *Illinois v. Vitale*, ____ U.S. ____, 100 S.Ct. 2260, 65 L.Ed.2d ____. *See Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715; *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977).

[8] We have examined the record closely to see whether the Bleckley County murder prosecution was based in any part on a theory of felony murder with the underlying felony being the kidnapping of Roy Asbell. The record clearly shows that petitioner was indicted, tried and convicted solely on the grounds that he committed murder with malice aforethought. The trial judge specifically instructed the jury on the requirement of malice.

> I further charge you that on the trial of a defendant for the offense of Murder the burden is on the State to prove malice, either expressed or implied, and unless the State proves malice beyond a reasonable doubt there can be no verdict of guilty of Murder, and you should acquit of that charge. For as I said, there can be no Murder without malice.

Where, as here, it is clear petitioner was tried and convicted for malice murder and that crime was not the "same offense" as the kidnapping with bodily injury for which he was convicted in the first proceeding, the Double Jeopardy Clause does not bar the malice murder conviction regardless of whether malice murder and felony murder are the "same offense" under the *Blockburger* test. Petitioner's double jeopardy argument is accordingly rejected.

II. INCOMPLETE TRANSCRIPT

The transcript in petitioner's murder trial does not include the closing and sentencing arguments of counsel or the *voir dire* of the jury. It appears that the entire trial was recorded by the court reporter. The customary practice in that court, however, was that *voir dire* and closing arguments were not transcribed in the absence of a request by the State or the defendant. Both of petitioner's attorneys were familiar with that practice but neither they nor the State requested that those portions of the trial be transcribed. Trial counsel were also informed by the trial judge that if they had any objections to the arguments, the objectionable portion of the argument and the objection would be transcribed. No objections were made. Thus, no part of closing arguments was transcribed.

At the time of petitioner's initial appeal to the Supreme Court of Georgia, the trial judge submitted as part of the record on appeal the detailed, seven-page questionnaire required by Ga. Code Ann. § 27-2537(a) and described in *Gregg v. Georgia*, 428 U.S. 153, 211–12, 96 S.Ct. 2909, 2942–43, 49 L.Ed.2d 859 (1976) (White, J., concurring). That questionnaire provided a comprehensive summary of the trial and a profile of the defendant.

An affidavit of the trial judge was received at the habeas

corpus hearing in state court. In that affidavit the trial judge made the following statement.

> In his closing argument, [the district attorney] factually summarized the evidence in the case. He made no allusions to race nor did he use any epithet in referring to Stephens. I recall no statement by [the district attorney] that was inflammatory or that injected passion or prejudice into the trial of Stephens.

Petitioner has not alleged that anything erroneous, inflammatory or prejudicial occurred in the untranscribed portion of the trial. As he stated in his brief, there is nothing to indicate that there was anything of special importance in that part of the trial. His contention, simply stated, is that a death sentence cannot constitutionally be affirmed when the transcript before the reviewing court does not contain the proceedings of the entire trial.

Petitioner relies principally on *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1976). In *Gardner*, the defendant was convicted of first degree murder and the jury recommended a life sentence. The trial judge did not accept the advisory verdict of the jury, but instead, on the basis of a presentence report, imposed the death penalty. The confidential portion of the presentence report was shown neither to counsel nor to the defendant, and neither requested to see it. The judge did not state on the record the substance of the material contained in the report. The report was also omitted from the record on appeal. The plurality opinion of Justice Stevens, joined by two other justices, found that this procedure violated the Due Process Clause and vacated the sentence.

[9, 10] *Gardner* does not establish the *per se* rule that petitioner attributes to it. The decisive test is the one suggested by the plurality's statement that the procedure on

appeal should be "[ ] consistent with the basis upon which the [state's] capital-sentencing procedure was upheld." *Id.* at 360 n.11, 97 S.Ct. at 1205. This Court must examine *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, to determine the basis upon which Georgia's capital-sentencing procedure was upheld and thereby identify the function the Georgia Supreme Court's review is to play in that procedure. If the record presented to the Georgia Supreme Court was so deficient that it would be impossible for that court to perform the function required of it under *Gregg*, or would create "a substantial risk" that the penalty is being inflicted in an arbitrary and capricious manner, *id.* at 188, 96 S.Ct. at 2932, petitioner's sentence cannot be permitted to stand. This analysis is especially appropriate where, as here, the case was tried and appealed before the decision in *Gregg*.

In discussing the automatic appeal of death-sentence cases to the Georgia Supreme Court, the *Gregg* plurality identified the role of that court in reviewing death sentences.

> That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.

Id. at 198, 96 S.Ct. at 2936.

Several considerations convince us that the record on appeal to the Georgia Supreme Court was adequate to permit that court to make the determinations required of it under *Gregg*. For the reasons set out below, we hold that *Gardner* is not controlling here and that petitioner's sentence should not be overturned on this ground. First,

the report in *Gardner* was clearly the key element in the decision to impose the death penalty, for it contained "the factual basis for the judge's rejection of the advisory verdict." 430 U.S. at 362, 97 S.Ct. at 1206. Without it, it was impossible for the state supreme court to determine whether the state was "administer[ing] its capital-sentencing procedures with an even hand." *Id.* at 361, 97 S.Ct. at 1206. In this case, however, the bases for the imposition of the death penalty are set forth in the record, and the record is more than adequate to permit the state court to determine whether the death penalty was imposed with an even hand.

Second, the plurality in *Gardner* was obviously disturbed by defense counsel's lack of opportunity to comment on and object to the portion or the report not in the record, and to challenge the accuracy or materiality of the information it contained. Honest and robust debate between adversaries is essential in foreclosing the possibility, in both fact and appearance, for the intrusion of caprice, emotion, and other arbitrary influences in the truth-seeking process. In the absence of such debate, it may be difficult to achieve accuracy and avoid the appearance of arbitrariness. In the present case, all proceedings took place in open court and all counsel had a full opportunity to comment on and challenge those proceedings. The appearance of arbitrariness is thus not a factor here as it was in *Gardner*.

Third, unlike in *Gardner*, there is affirmative evidence here that the conviction and sentence were based on the evidence presented and transcribed. The State has come forward with affirmative and uncontroverted proof that in the untranscribed arguments the district attorney merely factually summarized the evidence in the case. In addi-

tion, the jurors were twice instructed to base their decision on the facts and inferences presented in the evidence. The failure of petitioner's attorney to make any objection to the argument must also be seen as further evidence that there was no injection of anything prejudicial to petitioner and that the jury received the case solely on the basis of the evidence.

Fourth, the Georgia Supreme Court had before it in this case the detailed report of the trial judge on the defendant and the trial. At least three justices in *Gregg* felt the presence of this report was a significant factor in the state supreme court's review function.

> An important aspect of the new Georgia legislative scheme, however, is its provision for appellate review. Prompt review by the Georgia Supreme Court is provided for in every case in which the death penalty is imposed. To assist it in deciding whether to sustain the death penalty, the Georgia Supreme Court is supplied, in every case, with a report from the trial judge in the form of a standard questionaire. . . . The questionaire contains, *inter alia*, six questions designed to disclose whether race played a role in the case and one question asking the trial judge whether the evidence forecloses "all doubt respecting the defendant's guilt."

Id. at 211-12, 96 S.Ct. at 2942-43 (opinion of White, J., joined by Burger, C. J. and Rehnquist, J.). No such report was available to the state supreme court in *Gardner*.

Fifth, as noted above, petitioner has neither alleged nor offered any evidence that he was actually prejudiced by anything said in the untranscribed portion of the trial or by the failure to make the transcription. Both petitioner and one of his trial attorneys were present at the habeas corpus hearing in the Superior Court and neither suggested anything that was harmful, erroneous, inflamma-

tory, or prejudicial. *See Clayton v. Blackburn*, 578 F.2d 117 (5th Cir. 1978).

[11] The presence of these factors persuades us that the record as a whole adequately meets "the need for reliability in the determination that death is the appropriate punishment in [this] specific case," *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (opinion of Stewart, Powell and Stevens, JJ.), and that the capital-sentencing procedures have been administered with an even hand. *See Gardner v. Florida*, 430 U.S. at 361, 97 S.Ct. at 1206; *Proffitt v. Florida*, 428 U.S. 242, 250-53, 96 S.Ct. 2960, 2965-67, 49 L.Ed.2d 913 (1976) (opinion of Stewart, Powell and Stevens, JJ.). The state of the record reviewed by the Georgia Supreme Court was adequate to permit it to complete the review functions required of that court under *Gregg* and to ensure that there was no substantial risk that the death sentence was arbitrarily imposed. Accordingly, we hold that in this case the failure to transcribe counsel's arguments is not a constitutional violation requiring petitioner's sentence to be vacated.

Our holding should not be construed to suggest that we condone the failure of the trial court to transcribe the entire proceedings in a death penalty case. We note that the Supreme Court of Georgia has directed that the argument of counsel should henceforth be transcribed in all cases in which the death penalty is sought. *Stephens v. Hopper*, 241 Ga. at 600, 247 S.E.2d at 95.

[12] The question whether *voir dire* was properly conducted was considered by the Supreme Court of Georgia on direct appeal. *Stephens v. State*, 237 Ga. 259, 227 S.E.2d 261. That court ordered the trial record to be supplemented. From the extensive notes he made during the

trial, the judge filed a five-page supplement to the record on the *voir dire* issue, and that supplement was acknowledged by counsel. The detailed supplement clearly presented to the Supreme Court of Georgia the opportunity to consider any possible error or any injection of arbitrariness. Petitioner shows no prejudice from the failure to transcribe *voir dire*.

[13] The supplement also shows that the only potential juror expressing conscientious objections to the death penalty was struck by the State using one of its peremptory challenges. There is thus no *Witherspoon* issue in this appeal. *See Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

III. IMPROPER JURY INSTRUCTION

Petitioner contends that, while the jury was instructed in the sentencing phase of the trial that it must find at least one statutory aggravating circumstance before it could impose a death sentence, it was not instructed that even if it found such a circumstance it need not impose death.

[14] When an appellate court reviews the adequacy of an instruction to the jury, it must view the charge as a whole. *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973); *United States v. Brooks*, 611 F.2d 614, 619 (5th Cir. 1980). Only when the charge taken in its entirety fails to fairly present the issues to the jury will error be found. *United States v. Chandler*, 586 F.2d 593, 606 (5th Cir. 1978), *cert. denied*, 440 U.S. 927, 99 S.Ct. 1262, 59 L.Ed.2d 483 (1979).

[15] In his charge to the jury, the trial judge instructed them that they were to consider all the evidence of the case, including evidence of mitigation and aggravation. He

told the jury that unless one of the statutory aggravating circumstances was found to be proven beyond a reasonable doubt, they would not be authorized to impose a death penalty. He then specified which aggravating circumstances they could consider. He told them that if they wished to recommend mercy, they did not have to recite any mitigating or aggravating circumstances they might find. He concluded by instructing them how to fill out the forms.

Considering the charge as a whole, it is clear that the issue was fairly presented to the jury. The clear implication of the charge is that the jury could recommend mercy without stating what mitigating or aggravating circumstances could be present and yet the jury could still be free to impose life imprisonment. Petitioner's contention is rejected.

IV. AGGRAVATING CIRCUMSTANCES

The trial judge permitted the jury to consider four statutory aggravating circumstances: (1) the offense was committed by one who had escaped from lawful custody, Ga. Code Ann. § 27-2534.1(b)(9); (2) the offense was committed by one having a prior conviction for a capital felony, *id.* § 27-2534.1(b)(1); (3) the offense was committed by one having a substantial history of serious assaultive criminal convictions, *id.*; or (4) the offense was outrageously or wantonly vile, horrible or inhuman, *id.* § 27-2534.1(b)(7). The jury found the first three to be present but not the fourth.

Following trial and before petitioner's case was reviewed by the Supreme Court of Georgia, that court declared aggravating circumstance (3), commission by one having a substantial history of serious assaultive criminal

convictions, to be unconstitutionally vague. *Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386 (1976). After eliminating that circumstance from consideration of petitioner's appeal, the Georgia court in this case found the evidence supported the jury's findings of the other statutory aggravating circumstances and held that the sentence was not impaired. *Stephens v. State*, 237 Ga. at 261-62, 227 S.E.2d at 263.

In his state habeas corpus petition, petitioner contended that aggravating circumstance (2), commission by one having a prior conviction for a capital felony, was also invalid because he was under no such conviction at the time the crime was committed although he was admittedly under conviction for a capital felony at the time of his murder trial. The Supreme Court of Georgia interpreted the statute, Ga. Code Ann. § 27-2534.1(b)(1), as requiring that the jury should consider his record as of the time of sentencing. Accordingly, petitioner's contention was rejected. *Stephens v. Hopper*, 241 Ga. at 602-03, 247 S.E.2d at 96-97.

[16] On appeal to this Court, petitioner argues that the presence of unconstitutional aggravating circumstance (3) before the jury and the questionable interpretation of aggravating circumstance (2) create such potential for the intrusion of arbitrary influences into his sentence as to violate his constitutional rights and require his sentence to be vacated. The Supreme Court of Georgia is the ultimate authority on the law of Georgia and we are not permitted to question its interpretation of that State's statutes. *Tennon v. Ricketts*, 574 F.2d at 1245. We must therefore treat circumstance (2) as it is interpreted by the Georgia Supreme Court.

The question presented, then, is whether the death

penalty was invalid under the Constitution because it was imposed when one of the aggravating circumstances was later held to be unconstitutional even though there were two other aggravating circumstances, either of which by itself would be legally sufficient to permit the jury to impose the death penalty and as to both of which there is no uncertainty.

In *Stromberg v. California*, 283 U.S. 359, 367-68, 51, S.Ct. 532, 535, 75 L.Ed. 1117 (1931), the Supreme Court held that if the jury has been instructed to consider several grounds for conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside. *Accord, Bachellar v. Maryland*, 397 U.S. 564, 570-71, 90 S.Ct. 1312, 1315-16, 25 L.Ed.2d 570 (1970); *Street v. New York*, 394 U.S. 576, 585-88, 89 S.Ct. 1354, 1362-63, 22 L.Ed.2d 572 (1969); *Yates v. United States*, 354 U.S. 298, 311-12, 77 S.Ct. 1064, 1072-73, 1 L.Ed.2d 1356 (1957). This settled principle of law applies with particular force in cases in which the death penalty has been imposed. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), held that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner. The Constitution requires that the sentencer's discretion be channeled by clear and objective standards that "make rationally reviewable the process for imposing a sentence of death." *Woodson v. North Carolina*, 428 U.S. at 303, 96 S.Ct. at 2990 (opinion of Stewart, Powell and Stevens, JJ.).

It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively

affected by an unconstitutional statutory aggravating circumstance. The jury had the authority to return a life sentence even if it found statutory aggravating circumstances. It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the decision that the offense was committed by one having a substantial history of serious assaultive criminal convictions, an invalid ground. The presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of petitioner which otherwise would not have been before it. The instruction on the invalid circumstance may have directed the jury's attention to those convictions. It cannot be determined with the degree of certainty required in capital cases that the evidence of those convictions, together with the instruction, did not make a critical difference in the jury's decision to impose the death penalty.

[**17**] We hold that the jury's discretion here was not sufficiently channeled, *see Godfrey v. Georgia*, ___ U.S. ___, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and that the process in which the death penalty was imposed in this case was not "rationally reviewable." *Woodson v. North Carolina*, 428 U.S. at 303, 96 S.Ct. at 2990. *See also Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393. Petitioner's death sentence therefore cannot stand.

V. OTHER CONSIDERATIONS

In the brief filed by amicus curiae, NAACP Legal Defense and Educational Fund, the Court's attention is invited to three additional issues: (1) whether the trial judge should have ordered a competency hearing in light of petitioner's conduct at trial; (2) whether petitioner was

denied effective assistance of counsel because of counsel's inability to communicate with him; and (3) whether petitioner's uncounseled confession was knowing and voluntary, in view of allegations that it was given while appellant was under the influence of drugs. These issues may relate to petitioner's murder conviction, but they were not considered by the district court. On remand, that that court should take whatever action is appropriate with respect to those issues.

We reverse the district court's denial of habeas corpus relief insofar as it leaves standing the petitioner's death sentence, and the case is remanded for further proceedings.

REVERSED AND REMANDED.

THOMAS A. CLARK, Circuit Judge, concurring in part and dissenting in part:

I concur in the relief granted and all of the opinion except Part I which holds that there is no double jeopardy. It is my view that Stephens was placed in jeopardy for the offense of killing Asbill in Twiggs County under the holding of *Potts v. State*, 241 Ga. 67, 243 S.E.2d 510 (Ga.Sup. Ct.1978). In that case the court decided, under facts virtually identical to those in this case, that Potts could receive two death penalties, one in Cobb County for the kidnapping with bodily injury of Priest and one in Forsyth County for the murder of Priest. In refuting Stephens' double jeopardy contention, the Georgia Supreme Court relied specifically on its holding in *Potts*. [1]

If Stephens had been tried in Twiggs County he could have received the death sentence in that county as well as in Bleckley County, where he was given the death sentence

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[1] *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92, at 95 (1978).

which is the subject of this appeal. The only difficulty Stephens has in asserting the bar of his prior conviction to the subsequent prosecution, however, is in the venue provisions of Georgia law, which purport to vest jurisdiction for criminal homicides in the county where the cause of death was inflicted. The majority concludes that these provisions, as construed by the Georgia courts, divested the Twiggs County court of jurisdiction over the offense for which he was later tried, and which Georgia law required to be tried only in Bleckley County. I do not agree.

It is clear that Stephens could have received the death penalty in Twiggs County for the offense to which he there plead guilty, the kidnapping-with-bodily-injury-resulting-in-death of Roy Asbill. *Potts, supra,* says so. It is equally clear that Stephens could not have received the death penalty for any offense, however Georgia defines that offense and wherever Georgia requires that offense to be tried, absent proof that the victim was killed in the commission of the crime. As I understand Georgia law, that state does not now impose the death penalty for any offense not resulting in the death of the victim.[2] Since

[2] *Stanley v. State,* 240 Ga. 341, 241 S.E.2d 173, 179–80 (1977). If a death penalty in Twiggs County could be said to be based solely on kidnapping with bodily injury not resulting in death, I think the penalty, as affirmed in *Potts,* would be unconstitutional under *Coker v. Georgia,* 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), and *Eberheart v. Georgia,* 433 U.S. 917, 97 S.Ct. 2994, 53 L.Ed.2d 1104 (1977), the latter of which set aside a death penalty for kidnapping with bodily injury as cruel and unusual punishment. A reading of the lower court opinion in *Eberheart,* 232 Ga. 247, 206 S.E.2d 12 (1974), does not make clear that he was charged with kidnapping with bodily injury, although there was a kidnapping and bodily injury. However, Justice Undercofler wrote the lower court opinion in *Eberheart* as well as the opinion in *Collins v. State,* 239 Ga. 400, 236 S.E.2d 759 (1977), where at 761, in referring to *Eberheart,* he recited that earlier case had involved: "two death sentences for rape and kidnapping with bodily injury."

Georgia law does not recognize any jurisdictional limitations on a court's power to punish as *homicide* a crime Georgia law does not call homicide, I do not feel any similar limitation on my duty to inquire whether the offenses are, within the meaning of the Constitution, the "same offense."

If Stephens could have received the death penalty under his Twiggs County indictment, as *Potts* clearly held that he could, it could only have been upon proof of the killing of the victim. Likewise, his subsequent prosecution for murder, under any theory of either malice or felony murder, would require proof that the victim was killed.[3] That death, by whatever name called, is the greater, greatest, and ultimate offense. And that single offense cannot be the basis for several offenses that would permit the state to seek a separate death penalty for malice murder, felony murder, kidnapping with bodily injury murder, *ad infinitum*. Such reasoning tortures the meaning of "same offense" and the intent of forbidding the placing of a person twice in jeopardy for that same offense.

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[3] In this respect it is immaterial that Stephens received only a life sentence for that part of the kidnapping that occurred in Twiggs County, a punishment that might constitutionally attach to what happened in Twiggs County, taking no account of the killing that followed in Bleckley County. *See* note 2, supra. The fact remains that it was within the power of the Twiggs County court to punish for the Bleckley killing, with a sanction reserved exclusively for killing. Jeopardy had attached, therefore, for the Bleckley County homicide when Stephens was brought to answer for that act in Twiggs County. The state needn't have more than one opportunity to punish for that killing, and the double jeopardy guaranty should prevent it.

Alpha Otis O'Daniel STEPHENS,
Petitioner-Appellant,

v.

Walter ZANT, Superintendent,
Respondent-Appellee.

No. 79-2407.

United States Court of Appeals,
Fifth Circuit.

June 18, 1981.

Appeal from the United States District Court for the Middle District of Georgia.

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion November 26, 1980, 5 Cir., 1980, 631 F.2d 397).

Before INGRAM, RONEY and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

Upon consideration of the petition for rehearing filed by the appellee, we delete the following sentence that appears in 631 F.2d 397 on page 406, column 2, line 10:

> The presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of petitioner which otherwise would not have been before it.

The two sentences immediately following the above sentence at page 406 of the slip opinion are modified to read as follows:

> The instruction on the invalid circumstance may have unduly directed the jury's attention to his prior convictions. It cannot be determined with the degree of

certainty required in capital cases that the instruction did not make a critical difference in the jury's decision to impose the death penalty.

The petition for rehearing is DENIED. No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc is denied.

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ALEXANDER L. STEVAS,
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No. 81-89

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

WALTER ZANT, Warden,

Petitioner,

-against-

ALPHA OTIS O'DANIEL STEPHENS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JAMES C. BONNER, JR.
Prisoner Legal Counseling Project
University of Georgia School of Law
475 North Lumpkin Street
Athens, Georgia 30601
(404)542-4241

ATTORNEY OF RECORD

JACK GREENBERG
JAMES M. NABRIT, III
JOEL BERGER
JOHN CHARLES BOGER
DEBORAH FINS
10 Columbus Circle
New York, New York 10019

RICHARD E. SHAPIRO
344 Camp Street
New Orleans, Louisiana 70130

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

Whether a decision by the Supreme Court of Georgia which declared unconstitutional one of Georgia's statutory aggravating circumstances -- one that respondent's jury expressly designated in its sentencing verdict -- creates an unacceptable risk that respondent's jury may have recommended his death sentence at least in partial reliance upon that unconstitutional ground?

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No. 81-89

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

WALTER ZANT, Warden,

Petitioner,

-against-

ALPHA OTIS O'DANIEL STEPHENS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Alpha Otis O'Daniel Stephens respectfully requests that the Court deny the petition for a writ of certiorari filed on July 14, 1981 by petitioner Walter Zant, seeking review of the Fifth Circuit's opinion in this case. This brief in opposition is being filed within 30 days after receipt of the petition, as provided by Rule 22.1 of the Rules of the Court.

STATEMENT OF THE CASE

The facts of the case are adequately set forth in the opinion of the Court of Appeals appended to the certiorari petition, at A. 1-4, 34-37.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS REVERSED RESPONDENT'S DEATH SENTENCE IN PROPER ADHERENCE TO A CONSTITUTIONAL PRINCIPLE FIRMLY ESTABLISHED BY PRIOR DECISIONS OF THIS COURT.

At least since its decision in 1931 in Stromberg v. California, 283 U.S. 359, 367-38 (1931), this Court has consistently maintained that, in a case where a jury has been instructed to consider several grounds for conviction, one of which proves unconstitutional, any verdict that prevents a reviewing court from subsequently determining whether the jury may have relied on the unconstitutional ground must be set aside. Williams v. North Carolina, 317 U.S. 287, 291-92 (1942); Thomas v. Collins, 323 U.S. 516, 528-29 (1945); Cramer v. United States, 325 U.S. 1, 36 n.45 (1945); Terminiello v. Chicago, 337 U.S. 1, 5 (1949); Yates v. United States, 354 U.S. 298, 311-12 (1957); Gregory v. Chicago, 394 U.S. 111, 113 (1969); Street v. New York, 394 U.S. 576, 585-88 (1969); Bachellar v. Maryland, 397 U.S. 564, 570-71 (1970). As the Court explained in Street v. New York, supra, 394 U.S. at 587-88:

> "[E]ven assuming that the record precludes the inference that appellant's conviction might have been based solely on [the unconstitutional ground], we are still bound to reverse if the conviction could have been based upon both [the unconstitutional] and [the constitutional ground].
>
> * * *
>
> [U]nless the record negates the possibility that the conviction was based on both . . . '[t]he judgment . . . must be affirmed as to both or as to neither,' [for otherwise] . . . there is an unacceptable danger that the trier of fact will have regarded the two . . . as 'intertwined' and have rested the conviction on both together."

Under Georgia law, respondent's trial jury was responsible after his conviction for determining whether he would receive a life sentence or death sentence. Ga. Code Ann. §§27-2503(b); 27-2534.1(c). Following statutory procedures carefully designed in response to this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972) to guide and channel

the jury's sentencing deliberations, respondent's jury was precluded from imposing a death sentence unless it found at least one aggravating circumstance, Ga. Code Ann. §§26-3102; 27-2534.1(b), and thereafter unanimously chose to recommend that a penalty of death be inflicted on respondent. Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976).

Georgia law, however, clearly provided that, even if aggravating circumstances were found, respondent's jury nevertheless retained full authority to recommend imposition of a life sentence, Ga. Code Ann. §26-3102; see, e.g., Bowen v. State, 241 Ga. 492, 246 S.E.2d 322 (1978); Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977). The jury's responsibility, before fixing respondent's punishment, was "to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the . . . statutory aggravating circumstances which may be supported by the evidence." Ga. Code Ann. §27-2534.1(b).

Respondent's jury was expressly charged to consider four statutory aggravating circumstances, and, if it recommended a death sentence, to return a verdict designating each aggravating circumstance which it found proven beyond a reasonable doubt (Trial Tr. 320-22).*/ Respondent's jury did recommend a sentence of death and, in its verdict, the jury expressly found three statutory aggravating circumstances, among them Ga. Code Ann. §27-2534.1(b)(1), that "[t]he offense of Murder was committed by a person who has a substantial history of serious assaultive criminal convictions" (Trial Tr. 326).

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*/ Each reference to the transcript of respondent's trial which took place on January 20-21, 1975 in the Superior Court of Bleckley County, Georgia, is indicacted by the abbreviation "Trial Tr."

Prior to the appeal of respondent's case, the Supreme Court of Georgia, in Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976), struck down this "(b)(1)" statutory aggravating circumstance as "unconstitutionally vague," holding that it did not "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty," Arnold v. State, supra, 236 Ga. at 541, 224 S.E.2d at 391. Nevertheless, on respondent's appeal, without ever adverting to this Court's line of decisions beginning with Stromberg v. California, or the constitutional principle announced therein, the Supreme Court of Georgia upheld respondent's sentence, reasoning simply that "the evidence supports the jury's finding of the other statutory aggravating circumstances, and consequently the sentence is not impaired." Stephens v. State, 237 Ga. 259, __, 227 S.E.2d 261, 263 (1976). On respondent's state habeas corpus appeal, again without reference to the Stromberg principle, the Georgia Supreme Court once more reaffirmed respondent's sentence. Stephens v. Hopper, 241 Ga. 596, 247 S.E.2d 92 (1978).

The Court of Appeals, however, did properly consider the principle long ago announced by this Court in Stromberg stating:

> "It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance . . . It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty for the . . . invalid ground."

(A. 407). In light of controlling constitutional considerations, and in view moreover of this Court's special insistence in capital cases that any risk of an arbitrary sentence be minimized (A. 39, 41), the Court of Appeals reversed respondent's

sentence.

The opinion of the Court of Appeals is strongly reinforced by this Court's recent opinion in Godfrey v. Georgia, 446 U.S. 420, 428 (1980), in which the Court repeated its insistence that, to comply with Eighth Amendment requirements, a capital sentencing statute "must channel the [jury's] discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" (emphasis added), observing that otherwise, "the jury's interpretation [of sentencing issues on appeal] can only be the subject of sheer speculation." Id. at 429.*/

Certiorari, in sum, would be inappropriate in this case, since the Court of Appeals did no more than correctly consider and apply a well-established principle of constitutional law. The failure of the Supreme Court of Georgia in its two Stephens opinions to address either the principle itself or this Court's long line of controlling opinions on the subject creates no "clear conflict of law," as petitioner maintains, but rather evidences only a

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*/ Petitioner raises two additional points which require only a brief response. At pages 12-13 of his petition for certiorari, petitioner attempts to create a constitutionally significant distinction between the "general verdicts of guilty" at issue in the Stromberg line and the "penalty verdict" at issue here. This Court's opinion during this past Term in Bullington v. Missouri, __U.S. __, 68 L.Ed.2d 270 (1981) rejects such a distinction.

Petitioner also suggests that this Court in Gregg v. Georgia, 428 U.S. 153 (1976) approved a sentence imposed on the basis of aggravating circumstances some of which were later held unconstitutional. In fact, the Court noted only that "the death sentences imposed [on Gregg] for armed robbery . . . were vacated on the grounds that . . . the jury improperly considered the murder as aggravating circumstances for the robberies after having considered the armed robberies as aggravating circumstances for the murder." Gregg v. Georgia, supra, 428 U.S. at 161-62. No similarly erroneous aggravating circumstances were considered by Gregg's jury in imposing his sentence for murder.

constitutional error on the part of a state court which was identified and corrected by the Court of Appeals.*/

II.

EVEN IF CERTIORARI WERE OTHERWISE APPROPRIATE, THE INSTANT CASE IS AN INAPPROPRIATE ONE FOR RESOLUTION OF THIS ISSUE.

Despite the well-established constitutional principles relied upon by the Court of Appeals in reversing respondents' death sentence, petitioner has found in this Court's denial of certiorari in Westbrook v. Balkcom, __U.S.__, 66 L.Ed.2d 298 (1980), an indication that the Court might disagree with the Court of Appeals on this issue. Even if the statements by two Justices of the Court which accompanied the denial of certiorari in Westbrook do signify a willingness to consider anew the application of Stromberg to capital sentencing verdicts, a significant factor renders the present case an inappropriate vehicle for the Court's review. As the Court of Appeals noted in its opinion, at least three significant constitutional issues concerning respondent's guilt were not considered by the district court. The Court of Appeals has remanded the case to the district court to address these issues (A. 42). The Court of Appeals' judgment, therefore, is not final. Any subsequent reversal of respondent's conviction by the lower court would, under Georgia law, require a new trial on both guilt or innocence and on sentence, obviating any need to resolve the sentencing issues presented here. Cf. Brotherhood of Locomotive Firemen & Engineers v. Bangor & Aroostook R.R., 389 U.S. 327 (1967).

---

*/ Petitioner has cited a number of subsequent cases in which the Supreme Court of Georgia has followed its opinion in Stephens on this issue. In none of those cases did that court address either the principle announced in Stromberg or the Stromberg line of cases themselves.

CONCLUSION

For the reasons set forth above, respondent prays that the petition for a writ of certiorari be denied.

Dated: August 14, 1981.

Respectfully submitted,

s/ James C. Bonner, Jr.

JAMES C. BONNER, JR.
Prisoner Legal Counseling Project
University of Georgia School of Law
475 North Lumpkin Street
Athens, Georgia 30601
(404)542-4241

ATTORNEY OF RECORD

JACK GREENBERG
JAMES M. NABRIT, III
JOEL BERGER
JOHN CHARLES BOGER
DEBORAH FINS
10 Columbus Circle
New York, New York 10019

RICHARD E. SHAPIRO
344 Camp Street
New Orleans, Louisiana 70130

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

ATTORNEYS FOR RESPONDENT

No. 81-89

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

WALTER ZANT, Warden,

Petitioner,

-against-

ALPHA OTIS O'DANIEL STEPHENS,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am co-counsel for respondent and am a member of the bar of the Supreme Court of the United States, and that I served this brief in opposition on petitioner by placing a copy in the United States mail, first class mail, postage prepaid, addressed as follows:

Harrison Kohler, Esq.
Assistant Attorney General
132 State Judicial Bldg.
Atlanta, Georgia 30334

All parties required to be served have been served. Done this 14th day of August, 1981.

John Charles Boger

JOHN CHARLES BOGER

RECEIVED
AUG 17 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 81-89

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

WALTER ZANT, Warden,

Petitioner,

-against-

ALPHA OTIS O'DANIEL STEPHENS,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The respondent, Alpha Otis O'Daniel Stephens, by his undersigned counsel, asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the respondent, who is presently incarcerated at the Georgia Diagnostic & Classification Center in Jackson, Georgia. Mr. Stephens' affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

/s/ James C. Bonner, Jr.

JAMES C. BONNER, JR.
Prisoner Legal Counseling Project
University of Georgia School of Law
475 North Lumpkin Street
Athens, Georgia 30601
(404)542-4241

ATTORNEY OF RECORD

No. 81-89

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

WALTER ZANT, WARDEN, Petitioner, -against- ALPHA OTIS O'DANIEL STEPHENS, Respondent.	AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

JOHN CHARLES BOGER, being duly sworn, states:

1. I am co-counsel for Alpha Otis O'Daniel Stephens, the respondent in the above-captioned action, and I make this affidavit in support of Mr. Stephens' motion for leave to proceed in forma pauperis. My representation of Mr. Stephens is without remuneration.

2. Mr. Stephens is presently in the custody of the State of Georgia and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Stephens by me and will be forwarded to the Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Stephens is attached hereto.

3. Counsel was appointed to represent Mr. Stephens at his trial and on appeal. Volunteer counsel have represented Mr. Stephens throughout his federal habeas corpus proceedings, and Mr. Stephens has been permitted by the lower federal courts to proceed in forma pauperis.

4. I am informed and believe that because of his

poverty, Mr. Stephens is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Stephens is entitled to prevail in this action.

John Charles Boger
JOHN CHARLES BOGER

Sworn to before me this
14th day of August, 1981

NOTARY PUBLIC

JOEL BERGER
Notary Public, State of New York
No. 31-0281197
Qualified in New York County
Commission Expires March 30, 1982

No. 81-89

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

WALTER ZANT, Warden,	:	
Petitioner,	:	
-against-	:	
ALPHA OTIS O'DANIEL STEPHENS,	:	AFFIDAVIT
Respondent.	:	
	:	

I, Alpha Otis O'Daniel Stephens, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the respondent in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration. At trial and on appeal, lawyers were appointed to represent me because I was indigent.

5. I believe that I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Superior Court of Bleckley County, a trial court of the State of Georgia, of murder and was sentenced to death. I am being held at the Georgia Diagnostic

& Classification Center in Jackson, Georgia. I believe that the United States Court of Appeals for the Fifth Circuit was correct in vacating my death sentence and that both my conviction and my death sentence were imposed upon me in violation of my constitutional rights.

_____
ALPHA OTIS O'DANIEL STEPHENS

STATE OF GEORGIA
COUNTY OF BUTTS

The foregoing affidavit of Alpha Otis O'Daniel Stephens was subscribed and sworn to before me this day of .

_____
NOTARY PUBLIC

Office-Supreme Court, U.S.
FILED
AUG 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-89

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Supreme Court of the United States

OCTOBER TERM, 1981

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Petitioner,

v.

ALPHA OTIS O'DANIEL STEPHENS,
Respondent.

On Appeal from the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF BY PETITIONER

HARRISON KOHLER
Assistant Attorney General
Counsel of Record

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

HARRISON KOHLER
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3359

No. 81-89

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OCTOBER TERM, 1981

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Petitioner,

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Court of Appeals for the Fifth Circuit

REPLY BRIEF BY PETITIONER

In Respondent's brief in opposition to the petition for writ of certiorari, Respondent stated that a writ of certiorari should not be granted because the case is

not ripe for disposition. Respondent alleged that three significant issues concerning his guilt were not considered by the District Court and the Court of Appeals had allegedly directed the District Court to address these issues.

This argument is vacuous. Respondent, who has been represented by the same attorney in State and federal habeas corpus proceedings, failed to raise the issues of competency to stand trial, effective assistance of counsel, and voluntariness of his confession in the Superior Court of Tattnall County, on habeas appeal to the Georgia Supreme Court, or in the District Court in the Middle District of Georgia. Respondent was personally addressed by the Superior Court of Tattnall County and asked if he had any further allegations to add to

those raised by his attorney, and Respondent replied in open court that he did not. The first time that the issue of competency to stand trial, effective assistance of counsel, and involuntariness of his confession were presented was in an amicus brief on appeal to the Fifth Circuit Court of Appeals.

The Fifth Circuit Court of Appeals remanded these issues to the District Court to "take whatever action is appropriate respect to these issues." Stephens v. Zant, 631 F.2d 397, 407 (5th Cir. 1980). Given Respondent's failure to raise these issues to the State courts, he has deliberately bypassed his State procedures and is precluded from raising these issues before the District Court. See generally Murch v. Mottram, 409 U.S. 41 (1972).

The petition brought by Warden Zant is ripe for disposition, the issues are clear, there is a direct conflict between the Fifth Circuit Court of Appeals and the Georgia Supreme Court, and this Court should grant a writ of certiorari.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

Please serve:

HARRISON KOHLER
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3359

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

HARRISON KOHLER
Assistant Attorney General
Counsel of Record

CERTIFICATE OF SERVICE

I, Harrison Kohler, Attorney of Record for the Petitioner and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of this Reply Brief on Behalf of Petitioner upon the Respondent by depositing this brief in the United States Mail with sufficient, first-class postage affixed and addressed to counsel for Respondent as follows:

Mr. James C. Bonner, Jr.
Prisoner Legal Counseling
Project
475 North Lumpkin Street
Athens, Georgia 30601

Mr. John Charles Boger
NAACP Legal Defense and
Education Fund
10 Columbus Circle
New York, New York 10019

(Cont.)

This 24th day of August,

1981.

Harrison Kohler

HARRISON KOHLER
Assistant Attorney
General
Counsel of Record
for Petitioner

81-89

No. _____

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CLERK

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On Appeal from the United States
Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE BY THE ATTORNEY GENERAL OF LOUISIANA IN SUPPORT OF THE STATE OF GEORGIA'S PETITION FOR WRIT OF CERTIORARI

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

BARBARA RUTLEDGE
Assistant Attorney General
State of Louisiana

WALTER L. SMITH, JR.
Assistant Attorney General
State of Louisiana

PATRICK G. QUINLAN
Assistant Attorney General
State of Louisiana
1885 Wooddale Boulevard
Suite 1010
Baton Rouge, Louisiana 70806

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No. _____

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Respondent.

On Appeal from the United States Court of Appeals for the Fifth Circuit

---

BRIEF AMICUS CURIAE BY THE ATTORNEY GENERAL OF LOUISIANA IN SUPPORT OF THE STATE OF GEORGIA'S PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

When a death penalty is imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, is the death penalty to be vacated simply because one of the aggravating circumstances is eventually set aside?

AMICUS CURIAE INTEREST

The issue presented is of profound significance to the citizens and courts of Louisiana since Louisiana has a

capital sentencing procedure modeled after that currently employed in the State of Georgia, and, because Louisiana Courts have recently resolved a substantially identical issue contrary to the Fifth Circuit's holding in *Stephens v. Zant*, 631 F.2d 397 (5 Cir. 1980).

STATEMENT OF THE CASE

Respondent Alpha Otis O'Daniel Stephens was tried January 20-21, 1975, in the Superior Court of Bleckley County, Georgia. The jury found the defendant guilty of murder. At the sentencing phase of the trial, the jury found the existence, beyond a reasonable doubt, of three statutorily provided aggravating circumstances. The jury then recommended the death penalty.

While respondent's appeal was pending, the Georgia Supreme Court held one of the three aggravating circumstances to be invalid. See *Arnold v. State*, 236 Ga. 534 (1976). Nevertheless, the Georgia Supreme Court upheld respondent's death penalty because the evidence supported the jury's findings of the other two aggravating circumstances. *Stephens v. State*, 237 Ga. 259 (1976), *Cert. denied* 429 U.S. 986 (1977).

On habeas review, the Georgia Supreme Court again held that the fact that the jury was allowed to consider an aggravating circumstance later held to be unconstitutional, did not require the vacating of the death penalty. *Stephens v. Hopper*, 241 Ga. 596 (1978), *Cert. denied* 439 U.S. 991 (1978).

On habeas application to the Fifth Circuit Court of Appeal, the accused's death penalty was vacated. *Stephens v. Zant*, 631 F.2d 397 (5 Cir. 1980).

Upon the Fifth Circuit Court of Appeal's decision in

Stephens v. Zant, supra, the Attorney General of the State of Georgia invited the State of Louisiana to participate in a petition of Certiorari to this Honorable Court.

Following review of the disputed matter, it was determined that the Attorney General of the State of Louisiana would, in accord with Rules 33, 34 and 36 of the Supreme Court Rules of the United States, participate and file an amicus curiae brief.

ARGUMENT SUPPORTING GRANTING OF THE WRIT

The State of Georgia petitions this Honorable Court for a Writ of Certiorari to review the Fifth Circuit's holding in *Stephens v. Zant*, supra. The Honorable Attorney General of Georgia asserts that "Where a death penalty is imposed on the basis on (of) a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, the death penalty should not be set aside because one of these aggravating circumstances is set aside."

The Louisiana Attorney General concurs with the opinion of the Georgia Attorney General and wishes to express its views to this Honorable Court.

It is the Louisiana Attorney General's opinion that the holding of *Stephens v. Zant*, supra, is in direct conflict with Louisiana statutory provisions, as well as the majority view recently expressed by the Louisiana Supreme Court in *State v. Sonnier*, ___ So.2d ___ (La. 1981), (#81-K-1846). See La. C.Cr.P. section 905.3.

The Louisiana procedure established for the constitutional imposition of the death penalty is similar to that

provided by the State of Georgia. See La. C.Cr.P. 905 et seq. and Georgia Code Annotated section 27-2534.1.

The Louisiana Supreme Court has stated and frequently reiterated that Louisiana's capital punishment scheme is modeled on the Georgia procedure which was approved in *Gregg v. Georgia*, 96 S.Ct. 2909 (1976). Our statute, as Georgia's, provides for a bifurcated determination of an accused's guilt and punishment. At the sentencing hearing, the Georgia and Louisiana legislation both provide that the jury must consider whether certain specified aggravating circumstances exist and whether any mitigating circumstances are present. Only one aggravating circumstance need be found under the Georgia and Louisiana legislation to support a sentence of death. Further, other similarities exist between the Georgia and Louisiana legislative schemes: the jury must specify the aggravating circumstances found; the State Supreme Court must consider as part of its mandatory review whether the sentence was influenced by passion, prejudice, or any other arbitrary factor, whether the evidence supports the finding of statutory aggravating circumstance, and whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. See *State of Louisiana v. David Martin*, 376 So.2d 300 (La. 1979) and *State v. Williams*, 383 So.2d 369 (La. 1980).

The Louisiana Supreme Court has consistently interpreted Louisiana legislation to require the finding of *one* aggravating circumstance to justify the imposition of the death penalty. Article 905.3 of the Louisiana Code of Criminal Procedure pertinently provides:

> "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that *at least one statutory aggravating circumstance exists* and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances." (Emphasis added).

Since *State v. Martin*, supra, through the recent case of *State v. Elmo Patrick Sonnier*, supra, the Louisiana Supreme Court has indicated that only one statutorily provided aggravating circumstance need be proven beyond a reasonable doubt. See also *State v. Williams*, supra, and *State v. Colin Clark*, 387 So.2d 1124 (1980).

It is the Louisiana Attorney General's reasoned and professional belief that the Fifth Circuit Court of Appeal's ruling in *Stephens v. Zant*, supra, is in substantial conflict with current Louisiana jurisprudence.

In *State v. Elmo Patrick Sonnier*, supra, the defendant was convicted of first degree murder and sentenced to death following a penalty hearing.

The evidence presented by the State at the penalty trial established that the defendant and his brother kidnapped a young man and young woman, robbed them, burglarized their automobile, and raped the woman. Afterward, at the defendant's instigation, the two young persons were killed.

The jury found that the evidence established five aggravating circumstances. The jury found that the offender was engaged in the perpetration of an aggravated kidnapping, an aggravated burglary and an armed rob-

bery. The Court found that the evidence supported those findings. The jury also found that the defendant knowingly created a risk of death or great bodily harm to more than one person. Because the defendant killed both victims in a single and consecutive course of conduct, the evidence also supported that finding.

The jury's finding that the murder was committed in an especially heinous, atrocious or cruel manner was questioned by the Court in light of this Court's opinion in *Godfrey v. Georgia*, 100 S.Ct. 1759 (1980). The Court stated:

> "In the present case the jury's findings that the homicides were committed in an especially heinous, atrocious or cruel manner were of questionable constitutional validity. The jury was not instructed on the proper narrow construction of the statute." (at p. 16 of slip opinion).

Although the Court concluded that the evidence did not adequately support the jury's finding regarding one of the aggravating circumstances, it nevertheless affirmed the death sentence. The Court said:

> "The failure of one aggravating circumstance in this case does not so taint the proceedings as to invalidate the other aggravating circumstances found or the sentence of death." (at p. 16 of slip opinion).

CONCLUSION

Since the Fifth Circuit's resolution of the issue presented in *Stephens v. Zant* seems to be in substantial conflict with *State v. Sonnier*, supra, and Louisiana Code of Criminal Procedure section 905.3, the Louisiana Attorney General respectfully urges this Honorable Court

to grant the State of Georgia's timely petition for Writ of Certiorari.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General

BARBARA RUTLEDGE
Assistant Attorney General

WALTER L. SMITH, JR.
Assistant Attorney General

PATRICK G. QUINLAN
Assistant Attorney General
Counsel of Record
1885 Wooddale Boulevard
Suite 1010
Baton Rouge, Louisiana 70806
Telephone: 504/925-4165

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On Petition for Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

BRIEF AMICUS CURIAE OF THE STATE OF MONTANA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MICHAEL T. GREELY
Attorney General of Montana
Counsel of Record

JOHN H. MAYNARD
Assistant Attorney General

Capitol Station
Helena, Montana 59620
(406) 449-2026

Attorneys for the State of Montana

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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BRIEF AMICUS CURIAE OF THE STATE OF MONTANA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The State of Montana, by and through its Attorney General, Michael T. Greely, appears on behalf of its citizens and files this brief pursuant to Rule 36 of the Rules of this Court.

INTEREST OF THE STATE OF MONTANA IN THE RESOLUTION OF THE SUBSTANTIAL FEDERAL QUESTION PRESENTED

Montana law provides for imposition of the death penalty when a person is convicted of the offense of

deliberate homicide or aggravated kidnapping if the sentencing authority finds "one or more" of seven statutorily enumerated aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency. Sections 46-18-301 through 46-18-310, MCA. Three persons are under sentence of death in Montana at the present time and in each case the constitutionality of one or more aggravating circumstances has been challenged before the Montana Supreme Court. Resolution of the question presented in this case will have a substantial impact on Montana law because Montana law is sufficiently similar to Georgia's that the question presented in the petition can arise in Montana.

ARGUMENT

This Court should resolve the direct conflict presented in this case between the Georgia Supreme Court and the Fifth Circuit Court of Appeals. Resolution of the substantial federal question presented here will reach far beyond the boundaries of the State of Georgia or the Fifth Circuit because of the number of states, including Montana, that have, to a greater or lesser extent, patterned their laws relative to imposition of the death penalty on Georgia law following this Court's decision in *Gregg v. Georgia*, 428 U. S. 153 (1976).

Furthermore, this Court's decision in *Godfrey v. Georgia*, 446 U. S. 420 (1980), in which a statutory aggravating circumstance previously approved in *Gregg*, supra, was found to have been applied unconstitutionally, has resulted in renewed attacks on Montana's aggravating

circumstances. If one of these claims is found to have merit under *Godfrey,* supra, Montana will be faced with the exact question presented in the petition along with the conflicting decisions of the Fifth Circuit and the various state courts that have considered it. Additional litigation, in an area of the law already overburdened with protracted litigation, can be avoided by the prompt consideration and resolution of the issue presented in this petition.

CONCLUSION

Montana supports the Petition for Writ of Certiorari of petitioner in this cause and for the reasons expressed above, Montana urges the Court to grant certiorari and review the opinion and judgment of the court below.

Respectfully submitted,

MICHAEL T. GREELY
Attorney General of Montana

JOHN H. MAYNARD
Assistant Attorney General

Capitol Station
Helena, Montana 59620

Attorneys for the State of Montana

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NO. 81-89

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,
Petitioner,

v.

ALPHA OTIS O'DANIEL STEPHENS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

DARYL A. ROBINSON
Assistant Attorney General
Counsel of Record

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

DARYL A. ROBINSON
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

QUESTION PRESENTED

When a jury in a capital case has imposed a death penalty after finding two or more statutory aggravating circumstances to exist beyond a reasonable doubt, all of which are based upon evidence properly before the jury, should the death penalty be vacated because one of the statutory aggravating circumstances is later set aside?

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OCTOBER TERM, 1981

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 631 F.2d 397. A copy of the opinion is set forth in the Joint Appendix at J.A. 74. The amended opinion of the Court of Appeals for the Fifth Circuit is reported at 648 F.2d 446. A copy of the opinion is set forth in the Joint Appendix at J.A. 95. The opinion of the District Court dismissing the writ of habeas corpus is an unreported decision. *See Stephens v. Zant,* Case No.

79-30-MAC (M.D. Ga. May 11, 1979). A copy of that opinion is set forth in the Joint Appendix at J.A. 67.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered November 26, 1980. *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980). A timely petition for rehearing and rehearing en banc was filed, and the Fifth Circuit entered judgment June 18, 1981, amending the original opinion and denying the petition for rehearing. *Stephens v. Zant*, 648 F.2d 446 (5th Cir. 1981).

The petition for a writ of certiorari was timely filed and granted by this Court October 5, 1981. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Section I, Fourteenth Amendment to the Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES STATUTES

28 U.S.C. § 2254(a):

. . . [A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States.

STATEMENT OF THE CASE

Respondent Alpha Otis O'Daniel Stephens was tried January 20 and 21, 1975, in the Superior Court of Bleckley County, Georgia, for the murder of Roy Asbell. The evidence before the jury, amply recounted in the opinion of the Supreme Court of Georgia (J.A. 39), was that Stephens escaped from the Houston County, Georgia, jail and, accompanied by another man, went to the home of Charles Asbell in Twiggs County, Georgia. Stephens broke into the Asbell home and stole a number of weapons, including a .357 magnum pistol, which he loaded, and all of which he placed in a 1972 Dodge.

Roy Asbell, Charles Asbell's father, drove up to his son's house and discovered the burglary in process. When he confronted Stephens, Stephens ran to Asbell's car, jerked Asbell from the car, and hit him in the face several times.

> . . . Asbell begged not to be hit anymore. Stephens is 6 feet, 2 inches tall, while Asbell was 5 feet, 6 inches, and at that time Asbell was crippled as the result of a tractor accident. Asbell usually carried several hundred dollars on his person, and when he offered Stephens money in exchange for his life, Stephens took the offered money and kicked Asbell again.
>
> Stephens hit Asbell with a pistol, knocking him back into the Ranchero and told his alleged partner to kill him if he moved. They drove approximately three miles to a pasture, where they stopped and Asbell got out of the car and tried to escape. He hobbled to an abandoned building being used as a barn, but Stephens took the .357 magnum and ran after him. He took more money from Mr. Asbell and then placed the pistol in his ear and fired twice. Both bullets passed through Asbell's skull and exited at his right temple, causing his death. An autopsy showed that

> he sustained a broken jaw and several skull fractures. A trail of evidence connected Stephens to the crime. In pretrial statements to the police, he confessed this crime fully, as well as a string of other serious crimes which he committed after his escape and before the Asbell murder. He presented no defense at trial. During the hearing on sentence, however, he testified that his partner fired the fatal shots.

Stephens v. State, 237 Ga. 259, 259-60, 227 S.E.2d 261 (1976), *cert. denied*, 429 U.S. 986 (1977). (J.A. 39-40). Based upon this and other evidence, the jury found Stephens guilty.

During the sentencing phase of the trial, Stephens' prior convictions for motor vehicle theft, six counts of burglary, three counts of armed robbery, kidnapping with bodily injury, and murder were introduced into evidence.

The jury found three aggravating circumstances authorizing them to consider imposing the death penalty:

(1) the offense of murder was committed by a person with a prior record of conviction for a capital felony, Ga. Code Ann. § 27-2534.1(b)(1);

(2) the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions, Ga. Code Ann. § 27-2534.1(b)(1); and

(3) the offense of murder was committed by a person who has escaped from the lawful custody of a peace officer and place of lawful confinement, Ga. Code Ann. § 27-2534.1(b)(9).

After Stephens was tried but before his appeal was final, the Supreme Court of Georgia held that the portion of Ga. Code Ann. § 27-2534.1(b)(1) which allows the death penalty to be imposed when a murder is "committed by a person who has a substantial history of

serious assaultive criminal convictions" is unconstitutional. *Arnold v. State*, 236 Ga. 534, 542, 224 S.E.2d 386 (1976). Nevertheless, the Supreme Court of Georgia upheld Stephens' death penalty because the evidence supported the jury's findings of the other two aggravating circumstances. 237 Ga. at 261-62.

On appeal from the denial of state habeas corpus relief, the Supreme Court of Georgia again held that the jury properly was allowed to consider evidence adduced in support of the statutory aggravating circumstance later held to be unconstitutional; the setting aside of the aggravating circumstance did not require vacating the death penalty. *Stephens v. Hopper*, 241 Ga. 596, 603-04, 247 S.E.2d 92, *cert. denied*, 439 U.S. 991 (1978). In its consideration of the death penalty on direct appeal, the Supreme Court of Georgia had found that "the evidence supports the jury's findings of the other statutory aggravating circumstances, and consequently the sentence is not impaired." 237 Ga. at 262.

The United States District Court for the Middle District of Georgia denied federal habeas corpus relief. *Stephens v. Zant*, Case No. 79-30-MAC (M.D. Ga., May 11, 1979). However, on appeal to the United States Court of Appeals for the Fifth Circuit, the death penalty was vacated. *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980). Upon Warden Zant's timely petition for rehearing and rehearing en banc, the Fifth Circuit changed one paragraph of the prior opinion but denied the petition for rehearing and for rehearing en banc. *Stephens v. Zant*, 648 F.2d 446 (5th Cir. 1981).

SUMMARY OF THE ARGUMENT

Georgia law requires at least one statutory aggravating circumstance to be found by the jury before the jury can consider imposition of the death penalty. In the present case, the jury specified three statutory aggravating circumstances and, based upon all the aggravating and mitigating evidence before it, recommended a sentence of death.

Thereafter, one of the three circumstances specified by the jury was held unconstitutional by the Supreme Court of Georgia; however, the evidence introduced at trial in support of that aggravating circumstance, Stephens' prior convictions and sentences, was admissible and properly considered by the jury. The invalidation of the statutory aggravating circumstance had no effect whatsoever upon the evidence before the jury.

The Fifth Circuit erred in determining the jury's verdict was a general one because it plainly was not; the trial jury specified those statutory aggravating circumstances which it found supported by the evidence and which authorized it to consider imposition of a sentence of death. The Fifth Circuit further erred in finding that the trial court's instruction on the statutory aggravating circumstance later set aside may have unduly influenced the jury's deliberation and verdict because the evidence upon which it was based was admissible and properly before the jury for its consideration.

Because the invalidation of one statutory aggravating circumstance removed no evidence whatsoever from the jury's consideration, because as even the Fifth Circuit recognized there was no uncertainty that either of the two remaining aggravating circumstances would be legally sufficient to permit the jury to impose the death penalty,

and because Georgia law permits the jury to consider imposition of a death penalty upon a finding of one statutory aggravating circumstance, the decision below vacating the death penalty is wrong.

ARGUMENT AND CITATION OF AUTHORITY

I. WHEN A JURY IN A CAPITAL CASE HAS IMPOSED A DEATH PENALTY AFTER FINDING TWO OR MORE STATUTORY AGGRAVATING CIRCUMSTANCES TO EXIST BEYOND A REASONABLE DOUBT, ALL OF WHICH ARE BASED UPON EVIDENCE PROPERLY BEFORE THE JURY, THE DEATH PENALTY SHOULD NOT BE VACATED BECAUSE ONE OF THE STATUTORY CIRCUMSTANCES IS LATER SET ASIDE.

The issue presented for this Court's consideration is concise: When the evidence presented to a jury is more than sufficient to warrant imposition of a death penalty, should the death penalty be vacated because one of three statutory aggravating circumstances supported by admissible evidence and found to exist by the jury is later set aside?

This Court is familiar with Georgia's death penalty statute and the sentencing procedure set forth therein. Ga. Code Ann. § 27-2534.1(b) provides that "[i]n all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law" and any of ten specified "statutory aggravating circumstances which may be supported by the evidence. . . ." As this Court recognized in its initial review of Georgia's death penalty statute in *Gregg v. Georgia*, 428 U.S. 153, 197 (1976), the finding by a jury of

a statutory aggravating circumstance is a prerequisite to consideration of imposition of a sentence of death; it is not tantamount to imposing the death penalty.

The law in Georgia is well-settled that if a death penalty is imposed following the finding of two or more statutory aggravating circumstances, each of which has been established beyond a reasonable doubt, the death penalty will not be vacated because one of the statutory aggravating circumstances is set aside. *See, e.g., Stevens v. State*, 247 Ga. 698, 278 S.E.2d 398 (1981); *Hamilton v. State*, 246 Ga. 264, n. 1, 271 S.E.2d 173 (1980), *cert. denied*, ___ U.S. ___, *reh. denied*, ___ U.S. ___ (1981); *Brooks v. State*, 246 Ga. 262, 263, 271 S.E.2d 172 (1980), *cert. denied*, ___ U.S. ___ (1981); *Collins v. State*, 246 Ga. 261, 262, 271 S.E.2d 352 (1980), *cert. denied*, ___ U.S. ___ (1981); *Burger v. State*, 245 Ga. 458, 460-461, 265 S.E.2d 796, *cert. denied*, 446 U.S. 988 (1980); *Dampier v. State*, 245 Ga. 427, 883, n. 1, 265 S.E.2d 565, *cert. denied*, 449 U.S. 938 (1980); *Gates v. State*, 244 Ga. 587, 599, 261 S.E.2d 349 (1979), *cert. denied*, 445 U.S. 938 (1980); *Stephens v. Hopper*, 241 Ga. 596, 603-04, 247 S.E.2d 92, *cert. denied*, 439 U.S. 991 (1978); *Stephens v. State*, 237 Ga. 259, 261-62, 227 S.E.2d 261 (1976), *cert. denied*, 429 U.S. 986 (1977).

Although the precise question presented has not been directly decided by this Court, cases involving similar circumstances have been before the Court. For example, in *Gregg v. Georgia, supra*, the death penalty imposed for murder was upheld even though the death penalty for armed robbery had been set aside by the Supreme Court of Georgia. One of the aggravating circumstances on which the death penalty for murder was based was that it occurred during the commission of another capital felony, armed robbery. Ga. Code Ann. § 27-2534.1(b)(2).

In *Westbrook v. Balkcom*, 449 U.S. 999 (1980), Mr. Justice Stevens, concurring in the denial of certiorari, noted that

> the Supreme Court of Georgia, in cases remanded by this Court for further consideration in light of [*Godfrey v. Georgia*, 446 U.S. 420 (1980)], decided to adhere to its prior position that a death penalty imposed on the basis of a plurality of aggravating circumstances, each of which has been established by proof beyond a reasonable doubt, will not be set aside simply because one of those aggravating circumstances is vulnerable. . . . Because the Georgia Supreme Court's position is clear, and because I consider it consistent with this Court's decisions, I think the Court has correctly decided to deny certiorari in this case. . . .

Id. (Stevens, J., concurring).

In its original opinion vacating the death penalty, the United States Court of Appeals for the Fifth Circuit, relying primarily on the authority of *Stromberg v. California*, 283 U.S. 359 (1931), found that it was impossible for the Fifth Circuit, as a reviewing court, "to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance." *Stephens v. Zant*, 631 F.2d 397, 406 (5th Cir. 1980). The Court further opined:

> . . . The jury had the authority to return a life sentence even if it found statutory aggravating circumstances. It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the decision that the offense was committed by one having a substantial history of serious assaultive criminal convictions, an invalid ground. The presence of the unconstitutionally vague circumstance also made it possible for the jury to

> consider several prior convictions of petitioner which otherwise would not have been before it. The instruction on the invalid circumstance may have directed the jury's attention to those convictions. It cannot be determined with the degree of certainty required in capital cases that the evidence of those convictions, together with the instruction, did not make a critical difference in the jury's decision to impose the death penalty.

Id. This reasoning of the Fifth Circuit is based upon a misapplication of *Stromberg v. California, supra,* and a misunderstanding of the law of Georgia.

First, in *Stromberg v. California, supra,* this Court was concerned with a trial jury's return of a general verdict of guilty which could have rested upon either of three grounds, one of which was clearly impermissible. Because the verdict returned was a general one, it was impossible to determine whether the jury's verdict rested on the sole unconstitutional ground since the jury had been instructed in the disjunctive. A similar circumstance was addressed in *Bachellar v. Maryland,* 397 U.S. 564 (1970), also relied upon by the court below.

The verdict in the present case, however, is not a general verdict. Three statutory aggravating circumstances were specified in writing by the jury. All were supported by admissible evidence. As even the Fifth Circuit recognized, "there were two other aggravating circumstances, either of which by itself would be legally sufficient to permit the jury to impose the death penalty and as to both of which there is no uncertainty." *Stephens v. Zant,* 631 F.2d 397, 406 (5th Cir. 1980).

Second, the Court of Appeals held that "[t]he presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions

of [Stephens] which otherwise would not have been before it." *Id.* This determination by the Court of Appeals was simply incorrect. As the Supreme Court of Georgia had previously ruled on Stephens' appeal from the denial of state habeas corpus relief, even though the statutory aggravating circumstance was later declared invalid the evidence which was admitted to support it was properly before the jury:

> The evidence introduced by the state was the appellant's criminal record. Code Ann. § 27-2503(b) (Ga. L. 1974, pp. 352, 357) provides in part: "In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted in the same manner as presentence hearings conducted before the judge as provided in subsection (a) of this section." Under Code Ann. § 27-2503(a), the record of any prior criminal convictions of the defendant, if made known to the defendant prior to his trial, is admissible. The record of the appellant's prior criminal convictions was, therefore, admissible in the penalty phase of this trial. . . .

Stephens v. Hopper, 241 Ga. 596, 603-04, 247 S.E.2d 92, *cert. denied*, 439 U.S. 991 (1978). Following the Fifth Circuit's misconstruction of Georgia law, Warden Zant petitioned for rehearing and for rehearing en banc, pointing out that well-established Georgia law was clearly contrary to the opinion of the Court of Appeals. The petition was denied; however, the court below modified its previous opinion by deleting the sentence which stated that Stephens' prior convictions were not properly before the jury. The court also modified the sentence which followed, changing it from "may have directed the jury's

attention" to "may have *unduly* directed the jury's attention" to Stephens' prior convictions. *Stephens v. Zant*, 648 F.2d 446 (1981) (emphasis supplied).

Thus, even though the Fifth Circuit clearly indicated the remaining two statutory aggravating circumstances were amply supported by the evidence and properly before the jury, that either would be sufficient to authorize imposition of the death penalty, that the evidence submitted in support of the later invalidated statutory circumstance was also admissible and properly considered by the jury, and even though only one statutory aggravating circumstance need be found under Georgia law to authorize imposition of the death penalty. The court held that the invalidation of one in this case imbued the deliberation and verdict with constitutional error because it "may" have affected the jury, although the court could not tell with "the degree of certainty required in capital cases. . . ." *Id.*

The decision below is wrong, therefore, on two grounds: (1) the verdict returned was not a general one, because the jury listed specific circumstances supported by the evidence which authorized it to consider imposing and impose the death penalty, and (2) the invalidation of one of the three statutory aggravating circumstances had no effect, or no impermissible effect, because the evidence submitted in support of it was admissible evidence which the jury properly was allowed to consider in determining the appropriate punishment to be imposed.

Because only one statutory aggravating circumstance must be found to authorize a jury to consider imposing the death penalty, because even after the setting aside of one statutory aggravating circumstance in this case two remained, and because all the evidence before the jury,

including that supporting the invalid statutory aggravating circumstance, was admissible, the death sentence was authorized and lawfully imposed. The jury's recommendation of death was based not upon the statutory aggravating circumstances but upon all the evidence before the jury in aggravation and mitigation of punishment which had been introduced at both phases of the trial. Absent the removal of some material piece of evidence in aggravation or mitigation of punishment which was considered by the jury, the setting aside of less than all of the statutory aggravating circumstances found by the jury to exist beyond a reasonable doubt works absolutely no effect upon the jury's process of deliberation in reaching their recommendation of appropriate punishment.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests this Court to reverse the decision of the lower court.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

/s/
MARION O. GORDON
Senior Assistant
Attorney General

/s/
JOHN C. WALDEN
Senior Assistant
Attorney General

/s/
DARYL A. ROBINSON
Assistant Attorney General

Please serve:

DARYL A. ROBINSON
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

CORRECTED COPY

No. 81-89

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WALTER ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Petitioner,

against

ALPHA OTIS O'DANIEL STEPHENS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

JACK GREENBERG
JAMES M. NABRIT, III
JOEL BERGER
JOHN CHARLES BOGER
DEBORAH FINS
JAMES S. LIEBMAN
10 Columbus Circle
New York, New York 10019
(212) 586-8397

JAMES C. BONNER, JR.
Prisoner Legal Counseling
Project
475 North Lumpkin Street
Athens, Georgia 30601
(404) 542-4241
Attorney of Record

ANTHONY G. AMSTERDAM
New York University
Law School
40 Washington Square South
New York, New York 10012
(212) 598-2638
Attorneys for Respondent

Washington, D.C. • CLS PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

QUESTION PRESENTED

Whether the trial court's submission to respondent's sentencing jury of a statutory aggravating circumstance later held to be unconstitutional creates an unacceptable risk that his jury—which expressly designated that circumstance in its verdict calling for a death sentence—may have rested its sentencing decision in part upon an constitutionally invalid ground.

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No. 81-89

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

WALTER ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Petitioner,

against

ALPHA OTIS O'DANIEL STEPHENS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 631 F.2d 397 and appears in the Joint Appendix at J.A. 74. The opinion of the Court of Appeals on petition for rehearing is reported at 648 F.2d 446 and appears at J.A. 95. The opinion of the United States District Court for the Middle District of Georgia is unreported and appears at J.A. 67.

The opinion of the Georgia Supreme Court upon respondent's direct appeal from his conviction and death sentence is reported as *Stephens v. State*, 237 Ga. 259, 227 S.E.2d 261

(1976), and appears at J.A. 39. The opinion of the Supreme Court of Georgia in state postconviction proceedings is reported as *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92 (1978), and appears at J.A. 45.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on November 26, 1980. An amended opinion was filed on June 18, 1981. Petitioner filed a timely petition for certiorari which this Court granted on October 5, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

This case also involves the following statutes of the State of Georgia:

Ga. Code Ann. §26-3102

> "Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict

includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. § *27-2534.1(b)*

"In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

* * * * * *

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

* * * * * *

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement."

Ga. Code Ann. §*27-2534.1(c)*

"(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed."

STATEMENT OF THE CASE

Omissions in petitioner's statement require us to set forth a full statement of the case on behalf of respondent Stephens. See Rule 34.2

1. The Crime

Alpha Stephens was tried in the Superior Court of Bleckley County for the murder of Lucian Roy Asbell (Tr. T. 1).[1] The State presented evidence to show that, on August 19, 1974, Stephens was being held in the Houston County Jail awaiting trial for an escape from a work camp (Tr. T. 117, 194, 214),

[1]Each reference to the transcript of Stephens' trial, held in the Superior Court of Bleckley County on January 20-21, 1975, will be indicated by the abbreviation "Tr. T." followed by the number of the page on which the reference may be found.

when he escaped a second time with two other inmates (Tr. T. 117, 194, 214). The trio stole an automobile in the vicinity of the jail (Tr. T. 117-118, 194-95, 214) which they abandoned several blocks away (Tr. T. 214). They then hitchhiked to Macon, Georgia, where Stephens went to the home of his sister (Tr. T. 118, 196, 214). Stephens soon met a friend, Claude Sampson,[2] and the two began to drink beer and to consume illegal drugs (Tr. T. 118). During the next two days, while under the influence of drugs (Tr. T. 119, 196),[3] Stephens and Sampson committed two auto thefts, an armed robbery, and several burglaries (Tr. T. 119-20, 197-98, 215-16).

During the morning of August 21, 1974, Stephens and Sampson went to the home of Charles Asbell in nearby Twiggs County. After ascertaining that no one was at home (Tr. T. 199, 200), the two broke into the house and began to remove a number of rifles, shotguns and other items which they found inside (Tr. T. 120, 199, 217). After placing the weapons and other property in their automobile, they attempted, without success, to start the engine (Tr. T. 120).

Suddenly Roy Asbell, the father of homeowner Charles Asbell (Tr. T. 56), pulled into the driveway behind their automobile (Tr. T. 120, 199, 217). Asbell, a 48-year-old farmer and building contractor[4] called out "Nigger, what are you doing in my house" (T. 120; see Tr. T. 199, 217).

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[2]Sampson is referred to throughout the trial transcript by an alias, "Claude Kellog" (Tr. T. 215).

[3]According to the testimony of Savannah City Detective John Goode, Stephens reported that "he and Claude Sampson used various drugs and [were] quite high" (Tr. T. 196) during this period.

[4]Asbell was approximately 5'6" in height and weighed 155 to 160 pounds (Tr. T. 56). According to his son, Asbell had been in a tractor accident six months earlier, had not yet fully recovered from the accident, and consequently walked with a limp (Tr. T. 57).

Stephens told police that, at this, he became "infuriated" (Tr. T. 120, 199), approached Asbell and hit him several times (Tr. T. 217). Asbell in turn drew a .38 Derringer from his pocket (Tr. T. 315), but before Asbell could fire the weapon, Stephens disarmed him (*id.*), hitting him several times and knocking him to the ground (Tr. T. 120, 199). Asbell then pleaded with Stephens, "Don't kick me. Don't hurt me" (Tr. T. 199; see Tr. T. 120), and offered him several hundred dollar bills (*id.*). Stephens took the money, knocked Asbell back into his car using a .357 Magnum he had taken from the Asbell home, and then tossed the weapon to his companion, Claude Sampson (Tr. T. 121).[5]

After unsuccessfully attempting to start their car, Stephens and Sampson left with Roy Asbell in his Ford Ranchero, Claude Sampson holding the .357 Magnum on Asbell (Tr. T. 121, 201, 217) while Stephens drove (*id.*). They drove two or three miles to a pasture just over the Bleckley County line. According to Detective John Goode,

> "Stephens stated at this point that they got the old man out of the car and were going to carry him across the fence and tie him up in the woods and leave him. [Stephens] told me that [Asbell] broke and ran and that he ran into an old house nearby that had hay stored in it . . . ."

(Tr. T. 121).

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[5]Both the *amicus curiae* brief of The Washington Legal Foundation ("WLF Br.") and that of several Attorneys General ("Atty. Gen. Br.") assert that Stephens "pistol-whipped Asbell, inflicting a broken jaw and several skull fractures" (Atty. Gen. Br. at 4; WLF Br. at 4). The record does not support these assertions. Medical Examiner Richard Smith testified without contradiction that the fractures of Asbell's skull "were such as you find when a high powered bullet enters the skull" (Tr. T. 46) and that, while he could not ascertain the precise cause of Asbell's broken jaw (Tr. T. 50-51), it "was in the vicinity of one of the [bullet] entrance wounds" (Tr. T. 50) and might have been attributed to the impact of the bullet (Tr. T. 49-50).

Two different versions of the events that followed are found in the trial record. The more damaging version appears in Stephens' typewritten statement to police officers,[6] which the State introduced during the guilt phase of the trial.[7] Here Stephens said that after he followed Asbell into the house, Asbell confronted him with a metal stick (Tr. T. 121, 201, 218). He shot Asbell through the ear "three or four times"[8] at point blank range with the .357 Magnum (Tr. T. 201-02, 218).[9]

Following the shooting, Stephens and Sampson fled in Asbell's car to Savanah, Georgia, arriving later that afternoon (Tr. T. 122, 202, 218). Stephens bought drugs from a local

[6]Stephens denied that the signature on this typed statement was his, and testified that he did not remember making any such statement. His discussion of events surrounding his interrogation by Savannah, Georgia police appears at p. 10 *infra*.

[7]As respondent explains more fully below, see pp. 11-12 *infra*, Stephens' attorneys never spoke with their client prior to trial (Tr. T. 8-13), and it is not clear whether his attorneys were even aware of Stephens' account of the crime prior to the time Stephens took the stand during the sentencing phase. His testimony about the events surrounding the crime (note 20 *infra*) was not placed before his jury during the guilt or innocence phase.

[8]Medical evidence offered by the State established, however, that Asbell was shot twice (Tr. T. 46). After a thorough search, only one bullet was recovered by police at the scene (Tr. T. 52-55).

[9]The second version of the events surrounding the crime, in which Stephens denied shooting Asbell and placed the murder weapon in Sampson's hands at the time of the shooting, appears in note 20 *infra*. The State's evidence reveals that the day prior to Asbell's murder, Stephens and Sampson robbed a gasoline station in Twiggs County. During the robbery, Sampson, wielding a pistol, ordered a woman customer not to move, and when she disobeyed, shot at her. Stephens "begged [Sampson] . . . not to hurt her" (Tr. T. 151) and took the woman and a man outside where he turned them loose as he and Sampson left the scene (Tr. T. 215).

dealer (Tr. T. 122, 202), checked into a Savanah hotel, and spent the night with a friend whom he later accompanied home in a cab in the early morning hours (Tr. T. 122-23, 203, 218).

2. Stephens' Arrest and Interrogation

About 6:00 a.m., August 22, 1974, a Savannah Police Detective, H.F. Frye, found Stephens asleep on a bench at a bus stop (Tr. T. 91). As Stephens stood up, a .357 Magnum, later shown to have been the weapon stolen from the Asbell home (Tr. T. 63, 92), fell to the ground (Tr. T. 91). Officer Frye, who testified that he "could smell alcohol on [Stephens'] . . .breath," arrested him for being "drunk on the street," for carrying a concealed weapon, and for other violations (Tr. T. 156).

Several hours after his arrest, Stephens was interviewed by Detective John R. Goode, who obtained a number of inconsistent oral and written statements from him during the morning and early afternoon of August 22-23, 1974 (Tr. T. 108-09, 113-14, 115-17, 118-21, 127).[10] Detective Goode acknowledged that it "appeared to me that he had been on a

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[10]Detective Goode testified that he read Stephens his *Miranda* rights on Thursday morning, August 22, 1974, at the outset of his initial interview, and that Stephens read them back to Detective Goode (Tr. T. 107-08, 135). According to Detective Goode, he did not obtain a written waiver of rights from Stephens on Thursday, August 22 (Tr. T. 136), nor did he obtain such a waiver during his second interview at 9:00 a.m. on Friday, August 23 (Tr. T. 137-38). Only during his third interview, conducted at about 10:30 a.m. on Friday, August 23, after Stephens had been brought for the first time to a detective's cubicle and handcuffed to a chair (Tr. T. 139-40), did Stephens agree to sign a waiver form (Tr. T. 140).

pretty good drunk," or that he "might have been coming off" of some "downers" or barbituates (Tr. T. 132), but Goode denied that Stephens was still intoxicated (*id.*). Goode testified that, during his interviews, Stephens acted strangely and appeared "demented in some way."[11]

Stephens testified that he had taken "Purple Haze," a drug composed of acid or uppers, about an hour prior to his arrest, and that earlier during the evening had taken Triunal, smoked marijuana and drunk champagne and beer (Tr. T. 159,

---

[11]Tr. T. 150. (The text of this testimony appears in the third indented passage below.)

Goode first testified that Stephens

> "was sitting there in our office and the gleam and glitter in his eyes was out of the ordinary."

(Tr. T. 120.) Stephens' erratic demeanor persisted during the August 23 interviews, especially during his account of the abduction of Asbell:

> "At this time — we couldn't control Stephens at this time at all.
>
> Q. What do you mean, control him?
>
> A. Well, sir, his reactions — he — his eyes — the gleam and glitter in his eyes — it appeared that he was having illusions [sic] of grandeur or something. It was just like he was reacting the [sic] the crime and so forth. He was beginning to get violent, but fortunately we had him handcuffed and so forth. It was frightening to watch him when he was in this state of mind, the way he was explaining it to us."

(Tr. T. 121-122.) At another point, Detective Goode remembered that Stephens was

> "sitting in the chair with his hands like this handcuffed to the table leg he was clenching his hands with the handcuffs on [so] that the veins and so forth in his arms got real large so that the handcuffs were tight on his arms. His eyes were real glassy and fixed. He appeared to be a man who in my opinion was demented in some way. I asked him if the handcuffs were too tight and he didn't even hear me. He didn't seem to know that we were even in the room."

(Tr. T. 150.)

162).[12] He did not recall making the series of oral and written statements attributed to him (Tr. T. 162, 173), and specifically denied that the signature affixed to the typewritten statement was his own (Tr. T. 173).[13]

3. The Bleckley County Indictment[14]

(a) The Guilt Phase

Stephens was indicted in November, 1974 in Bleckley County for the murder of Roy Asbell. He pleaded not guilty and stood trial in January, 1975. At the outset of his trial,

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[12]He stated that he vomited repeatedly in his cell at the Savannah Police Station and requested medical attention, although none was provided (Tr. T. 172).

[13]He also did not recall receiving any *Miranda* warnings from officers (Tr. T. 162). The trial court eventually ruled that Stephens' statements were voluntary, with a qualification that "[p]ossibly if the statements that were made were all made immediately upon arrest I might find that intoxication and use of drugs would have something to do with it, but I think the period of interrogation here and the period within which the statements were made clearly indicate that he was no [sic] under the influence of anything when the written statement was made and when the oral statement to Detective Goode that he testified about were [sic] made." (Tr. T. 177-78.)

[14]On October 17, 1974, Stephens appeared in the Superior Court of Twiggs County, Georgia, and pleaded guilty to motor vehicle theft, armed robbery, burglary, and kidnapping with bodily injury for his part in the crimes involving Roy Asbell (see J.A. 4-5, 46). He received three consecutive life sentences and other lesser sentences as punishment for his role in those crimes (J.A. 69). Stephens contended below that his subsequent indictment in Bleckley County for the same criminal transaction concerning which he had pleaded guilty and been sentenced in Twiggs County violated the Double Jeopardy Clause of the Fifth Amendment (J.A. 62-64). The District Court (J.A. 70-72) and the Circuit Court (J.A. 76-81) rejected this claim.

Hugh Lawson, one of his appointed two attorneys, announced to the court that

> "our defense here is handicapped by the fact that we are evidently altogether out of communication with the defendant himself. He will not communicate with us meaningfully and does not seem to respond meaningfully to any communication that we make to him."

(Tr. T. 8.)

The attorneys stated that they had sought to speak with Stephens on only two occasions prior to the trial (Tr. T. 10), first at the Georgia State Prison in Reidsville, Georgia, and a second time prior to Stephens' commitment hearing in Cochran, Georgia (Tr. T. 11):

> "He did not communicate with us when we did try to communicate with him at Reidsville, and he did not communicate with us at the court house in Cochran, and he will not communicate with us today. I don't know what else to say or do about it."

(Tr. T. 11.)

The trial court, noting that Stephens had been given an opportunity to obtain private counsel, urged Stephens to cooperate with his lawyers, and proceeded with the trial (Tr. T. 13). Later the trial judge stated for the record that although at the time Stephens initially appeared before the court, the judge

> "undertook to explain his rights to an attorney, the nature of the charge and his rights in general to him Mr. Stephens would not respond to anything that [the judge] . . . said to him at that time in the court room. He remained silent. The Court did not know precisely what to make of this, and through officers of the Court inquired whether it might not be well to have psychiatric or other examination of Mr. Stephens, not knowing the nature of the problem, and it was brought to my attention

> that there were times when he was quite affable and talkative and other times when he would not talk at all and that there did not seem to be any mental difficulties at all. It was at this point, and this had been just a matter of a few hours or at best a day or two, the Court made a decision . . . to go ahead and appoint attorneys."

(Tr. T. 99.)

During the guilt phase, the State offered as its principal evidence the testimony of those who had found Asbell's body (John Anthony, Tr. T. 15-30; Sheriff Edward Coley, Jr., Tr. T. 30-42) and those who conducted the medical examination (Dr. Richard Smith, Tr. T. 42-51), the ballistics search (Deputy Sheriff Charles Cranford, Tr. T. 51-56; Agent Joe White, Tr. T. 248-58) and the fingerprint examination (Agent Tony Rainey, Tr. T. 80-89). The State also presented the Savannah police officers who arrested (Det. H.F. Frye, Tr. T. 89-96) and interviewd Stephens (Det. John Goode, Tr. T. 104-152; 179-248). Detective Goode read Stephens' typed statement to the jury (Tr. T. 214-18), and Charles Asbell identified the .357 Magnum taken from Stephens in Savannah as the pistol stolen from his home (Tr. T. 258-63). The State then established that this pistol had been used to shoot Roy Asbell (Agent Kelly Fite, Tr. T. 263-71).

Stephens' trial attorneys offered no evidence on Stephens' behalf (Tr. T. 287). The jury returned a verdict of guilty of murder (Tr. T. 313).

(b) The Sentencing Phase

During the sentencing phase of Stephens' trial, the State sought to establish four statutory aggravating circumstances under Ga. Code Ann §27-2534.1(b):

(i) that the murder had been committed by a person "with a prior record of conviction for a Capital felony" (J.A. 18);[15]

(ii) that the murder was committed by a person "who has a substantial history of serious assaultive criminal convictions" (*id.*);[16]

(iii) that the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim" (*id.*);[17] and

(iv) that the murder "was committed by a person who has escaped from the lawful custody of a peace officer or place of lawful confinement" (J.A. 18-19).[18]

To support its aggravating circumstances, the State offered the record of eight prior convictions (J.A. 3), six of which were eventually admitted into evidence by the trial court (J.A. 12).[19] The State offered no additional evidence (J.A. 12).

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[15]Ga. Code Ann §27-2534.1(b)(1).

[16]Ga. Code Ann. §27-2534.1(b)(1).

[17]Ga. Code Ann. § 27-2534.1(b)(7).

[18]Ga. Code Ann. §27-2534.1(b)(9).

[19]The convictions before the jury, all on pleas of guilty entered in the Superior Court of Twiggs County, consist of two counts of armed robbery, five counts of burglary, and one count of murder (J.A. 25-38).

Stephens took the stand in his own defense and testified that he had not himself shot Roy Asbell and that he regretted Asbell's death (J.A. 13-17).[20]

Following closing arguments,[21] the trial court charged Stephens' jury on the statutory principles which were to guide its sentencing deliberations (J.A. 18-19). The jury was instructed: (i) that it was authorized to consider all the evidence received throughout the trial, specifically "all facts and circumstances presented in extinuation [sic], mitigation

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[20]Stephens testified that his original intention at the pasture site was to tie Asbell up and leave him (Tr. T. 216). However, Asbell escaped when Stephens "got out of the car . . . [and] stumbled in the ditch" (Tr. T. 316) (Stephens explained that he was "pretty high. Both of us was pretty high" (*id.*).) Stephens then told the jury:

> "[Sampson] . . . asked me did I want to go after him. I said, 'No, let him go.' I said, 'By the time he can get somewhere and call the police we can be about four or five miles down the road, at least to Dublin,' He said, 'No, we had better get him.' So we walked on across the field and went into the house. I didn't have the gun. I gave [Sampson] . . . the gun before we left the [Asbell] house. So we walked up on the front porch, and when we opened the door he backed up, and then he went in. I was coming up the steps, and I heard two shots. I turned around on my heel and went back down the steps. . . . As far as the man getting killed, I'm sorry about that. I ain't going to tell you no lie. If I could bring him back, I probably would, but that I can't do. There ain't nothing I can do about it. If I had shot him, I would say I shot him. I would tell you or anybody else I shot him if I did. So whatever you all come up with is all right with me. I know I deserve to be punished."

(Tr. T. 316-17.)

[21]Neither the closing arguments of counsel nor the *voir dire* examination of Stephens' jury were transcribed. Respondent urged below that the State's failure to record these proceedings violated his "rights under the Eighth and 14th Amendments not to be deprived of his life except upon due process of law and except in proceedings not influenced by arbitrary and capricious considerations" (J.A. 64). The District court (J.A. 72) and the Court of Appeals (J.A. 81-87) rejected this claim.

and aggravation of punishment;" (ii) that the two statutory sentence options were death or life imprisonment; (iii) that "the jury [should] consider any mitigating circumstances or aggravating circumstances authorized by law;" (iv) that the statutory aggravating circumstances included a prior conviction for a capital felony, a substantial history of serious assaultive criminal convictions, an outrageously or wantonly vile offense, or a murder committed by a person who had escaped from lawful custody; (v) that the statutory aggravating circumstances were "stated in writing and [would] be out with you during your deliberations;" (vi) that "[u]nless one or more of these statutory aggravating circumstances [were] . . . proven beyond a reasonable doubt [the jury would] . . . not be authorized to fix punishment at death;" (vii) that if it determined to impose death, it should "recite in the exact words which" the trial court had provided "the one or more circumstances [it] . . . found to be proven beyond a reasonable doubt;" (viii) and that if, on the other hand, it recommended mercy for the defendant, no recitation of mitigating or aggravating circumstances would be required (J.A. 18-19).[22]

The jury returned a verdict recommending the death penalty and expressly finding three aggravating circumtances: (i) a prior record of conviction for a capital felony; (ii) a substantial history of serious assaultive criminal convictions; and (iii) a prior escape from lawful custody (J.A. 23).[23]

---

[22]Stephens alleged below that this charge was constitutionally deficient since his jury was not clearly instructed either on the proper role of mitigating circumstances in its deliberations or on its freedom to impose a life sentence even if one or more aggravating circumstances were found (J.A. 64). The District Court (J.A. 73) and the Circuit Court (J.A. 87-88) rejected this claim.

[23]Since the Georgia statute does not require the sentencing to specify whether any mitigating circumstances are found, the record does not reflect whether Stephens' jury accepted his testimony that Claude Sampson killed Roy Asbell.

4. The Direct Appeal

Stephens appealed his conviction and death sentence. Prior to its decision of his appeal, the Supreme Court of Georgia held, in *Arnold v. State*, 236 Ga. 534, 542, 224 S.E.2d 386, 391 (1976), that the aggravating circumstance defined by Ga. Code Ann. §27-2534.1(b)(1) as "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty" and was therefore "unconstitutionally vague." Although Stephens had not asserted this claim in his own appeal, the Supreme Court of Georgia expressly considered the impact of *Arnold* upon his case. It noted that in *Arnold*, the defendant's substantial history of serious assaultive behavior "was the sole aggravating circumstance found by the jury," and it held that, in *Stephens*, since "the evidence supports the jury's findings of the other statutory aggravating circumstances . . . the sentence is not impaired" (J.A. 42). *Stephens v. State*, 237 Ga. 259, 262, 227 S.E.2d 261, 263 (1976).

5. The State Habeas Corpus Proceeding

In his petition for a writ of habeas corpus filed in the Superior Court of Tattnall County, Stephens asserted that his death sentence violated the Eighth and Fourteenth Amendments because it was based in part upon his jury's finding of an unconstitutional statutory aggravating circumstance. The Superior Court rejected his claim, as did the Supreme Court of Georgia on appeal (J.A. 54-55). *Stephens v. Hopper*, 241 Ga. 596, 603-04, 247 S.E.2d 92, 97 (1978).

6. The Federal District Court

Having properly exhausted this claim, Stephens presented it to the federal courts in his petition for a writ of habeas corpus filed in the United States District Court for the Middle District of Georgia (J.A. 64). The District Court denied relief, holding simply that "[t]he jury found beyond a reasonable doubt two statutory aggravating circumstances . . . supported by the evidence and either finding is grounds for the imposition of the death sentence" (J.A. 73). *Stephens v. Zant*, No. 79-30-MAC (M.D. Ga. May 11, 1979).

7. The Court of Appeals' Opinion

On appeal, the United States Court of Appeals for the Fifth Circuit set aside Stephens' death sentence (J.A. 74-94).[24]

[24]The Fifth Circuit rejected Stephens' claims that: (i) his conviction for the murder of Roy Asbell in Bleckley County, following a plea for the kidnapping with bodily injury of Roy Asbell in Twiggs County, constituted double jeopardy (J.A. 76-81) (T. Clark, J. dissented on this ground, J.A. 92-94); (ii) that the failure to transcribe the *voir dire* and closing arguments violated the Eighth and Fourteenth Amendments (J.A. 81-87); and (iii) that the trial court's sentencing instructions were constitutionally inadequate (J.A. 87-88).

The Fifth Circuit remanded the case to the District Court for "whatever action is appropriate with respect to [three] . . . issues" bearing upon Stephens' conviction that had not been presented to the District Court in the first instance but were called to the Court of Appeal's attention in an *amicus curiae* brief:

> "(1) whether the trial jude should have ordered a compentency hearing in light of [Stephens'] . . . conduct at trial; (2) whether [Stephens] . . . was denied effective assistance of counsel because of counsel's inability to communicate with him; and (3) whether [Stephens'] . . . uncounseled confession was knowing and voluntary, in view of allegations that it was given while appellant was under the influence of drugs."

(continued)

The Fifth Circuit held that it was "impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional aggravating circumstance" (J.A. 90-91). Since Stephens' jury had "authority to return a life sentence even if it found statutory circumstances" (J.A. 92), there was an inevitable risk that, but for the trial court's submission and the jury's finding of the unconstitutional circumstance, the jury would not have recommended the death penalty. Drawing upon the logic developed by this Court in *Stromberg v. California*, 283 U.S. 359 (1931), and upon the Court's insistence in *Furman v. Georgia*, 408 U.S. 238 (1972), that " the death penalty . . . not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner" (J.A. 90), the Court of Appeals concluded that "the jury's discretion here was not sufficiently channeled . . . and that the process in which the death penalty was imposed in this case was not 'rationally reviewable'" (J.A. 91).

Petitioner Zant petitioned for rehearing and for rehearing *en banc*, largely on the basis of a passage in the panel's opinion stating that "[t]he presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of [Stephens] . . . which

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(footnote continued from preceding page)

(J.A. 91-92.) *Amicus curiae* also pointed out a fourth issue in Stephens' case that had not been addressed below—the failure to obtain a jury finding on the question whether Stephens himself ever took or intended to take the life of the victim, and whether a death sentence imposed without such a finding violates the Eighth and Fourteenth Amendments. We note that the Court has granted certiorari in *Enmund v. Florida*, No. 81-5321, ___ U.S. ___, 50 U.S. L.W. 3300 (Oct. 20, 1981) to resolve a similar claim.

otherwise would not have been before it. The instruction on the invalid circumstance may have directed the jury's attention to those convictions" (J.A. 91). Zant called the Fifth Circuit's attention to several prior Georgia cases holding that felony convictions are admissible during the penalty phase of capital trial. *E.g.*, *Hughes v. State*, 239 Ga. 393, 397-98, 236 S.E.2d 829, 833 (1977).

The Court of Appeals, in an amended opinion, deleted its reference to the *inadmissibility* of evidence of prior felony convictions but reiterated its observation that the unconstitutional instruction "may have unduly directed the jury's attention to his prior convictions" (J.A. 95). The petition for rehearing was otherwise denied. No judge in regular active service in the Fifth Circuit requested a poll on petitioner Zant's petition for rehearing *en banc*, and that petition was consequently denied.[25].

SUMMARY OF ARGUMENT

It is undisputed that Alpha Stephens' jury received an erroneous instruction authorizing it to base a verdict of death upon a statutory aggravating circumstance later held unconstitutional. Equally clearly, Stephens' jury considered the invalid aggravating circumstance, for it rendered a written verdict which explicitly identified that circumstance as one of the bases for its determination to impose a death sentence. The question presented here is thus whether a capital sentence founded in part upon an unconstitutional considera-

[25]The Attorneys General as *amici curiae* direct the Court's attention to a subsequent decision by the Fifth Circuit in *Williams v. Blackburn*, 649 F.2d 1019 (5th Cir. 1981) which they suggest "appears to directly conflict with its decision in the present case." (Atty. Gen Br., at 15 n.7). The Fifth Circuit has subsequently vacated its opinion in *Williams* and ordered the case to be reheard *en banc*. *Williams v. Blackburn*, ___ F.2d ___ (5th Cir. 1981).

tion may be affirmed on the ground that other, constitutionally permissible factors were also weighed by the jury in reaching its sentencing determination.

Central principles of this Court's Eighth Amendment jurisprudence answer the question: no death sentence imposed after such an error may be affirmed. An unbroken line of decisions since *Furman v. Georgia*, 408 U.S. 238 (1972), requires any State wishing to impose a capital sentence to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a death sentence,'" *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (footnote omitted). Special capital sentencing require ments derive from the Court's recognition that "there is a significant constitutional difference between the death penalty and lesser punishments," *Beck v. Alabama*, 447 U.S. 625, 637 (1980), and that this qualitative difference "calls for a greater of reliability when the death sentence is imposed," *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

The submission to Stephens' jury of an invalid aggravating circumstance violated each of these procedural requirements. Instead of channeling the jury's sentencing discretion according to a "clear and objective" standard, it explicitly invited the exercise of that discretion to be based in part upon consideration of a standard which the Supreme Court of Georgia itself has judged to be unconstitutionally vague. The result was a death sentence resting, to an extent that no appellate court can ever reconstruct or adequately review, upon an unconstitutional foundation. To sustain such a sentence would "diminish the reliability of the [sentencing]... determination," *Beck v. Alabama, supra*, 447 U.S. at 638, in a manner which "creates the risk" of a misguided choice of sentence that is "unacceptable" when "the choice is between

life and death," *Lockett v. Ohio*, *supra*, 438 U.S. at 605.

Other settled lines of authority compel the same conclusion. In *Stromberg v. California*, 283 U.S. 359 (1931), and succeeding cases, the Court has developed the rule that no verdict dependent on a combination of constitutionally impermissible and constitutionally permissible grounds can stand, because of "an unacceptable danger that the trier of fact will have regarded the two . . . as 'intertwined' and have rested [its decision] . . . on both together," *Street v. New York*, 394 U.S. 576, 588 (1969). The *Stromberg* line is consistent with many prior decisions of the Court which have stressed the necessity of accurate jury instructions, especially on capital sentencing issues. The manifest fairness and logic of requiring such instructions has led a majority of the state courts which have faced the issue to reach the same conclusion adopted by the Court of Appeals below, vacating death sentences tainted by a jury's consideration of an impermissible aggravating factor.

Petitioner Zant opposes the Court of Appeals' judgment primarily as an overbroad reading of the *Stromberg* line. Yet petitioner identifies no sound distinction between that line and the present case. If there is any distinction at all, it is that the Eighth Amendment's requirement of heightened reliability in capital sentencing (which petitioner largely ignores) renders *Stromberg*'s reasoning still more compelling in the capital context.

Amici curiae base their arguments for reversal upon a tortured interpretation of capital sentencing procedures that is without foundation in this Court's prior cases and would make nonsense of the Court's efforts to minimize the risk of arbitrariness in capital sentencing. Under close inspection, *amici*'s arguments depend upon the unsupported speculation that Stephens' jury would have imposed a death sentence no matter what sentencing instructions it received. Neither the

Eighth Amendment nor the Due Process Clause permit a capital inmate to be sent to his death upon this sort of baseless surmise. Stephens is entitled to a new sentencing hearing untainted by the error present in this record.

I.

THIS COURT'S EIGHTH AMENDMENT JURISPRUDENCE PLAINLY REQUIRES THE REVERSAL OF A DEATH SENTENCE IMPOSED IN PARTIAL RELIANCE UPON AN UNCONSTITUTIONAL AGGRAVATING CIRCUMSTANCE

The Court of Appeals' reversal of Alpha Stephens' death sentence marks no new direction in capital punishment law. Instead, it is plainly consistent with—indeed, compelled by—the Eighth Amendment standards of procedural fairness carefully developed by this Court during the past decade. In *Furman v. Georgia*, 408 U.S. 238 (1972), after "focusing on the procedures by which convicted defendants were selected for the dealth penalty," the Court "conclu[ded] that the statutes before [it] . . . were constitutionally invalid," *Gregg v. Georgia*, 428 U.S. 153, 179 (1976) (opinion of Justices Stewart, Powell & Stevens). The procedural shortcoming identified in those statutes was that their lack of guidance to the sentencing jury "created a substantial risk that [the death penalty] . . . would be inflicted in an arbitrary and capricious manner," *id.* at 188.

Four years later, in *Gregg v. Georgia* and companion cases,[26] the Court examined three restructured capital statutes

[26] *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

which "attempted to address the concerns expressed by the Court in *Furman* . . . by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence," *Gregg v. Georgia, supra*, 428 U.S. at 180. The very procedural features upon which the Court relied in *Gregg* to uphold the Georgia statute are those most seriously compromised by the unconstitutional instruction given to Alpha Stephens' jury. A brief reexamination of these features demonstrates exactly why the Court of Appeals was led to invalidate Stephens' death sentence.[27]

The most prominent characteristic of Georgia's post-*Furman* capital statute was described by the Court as being the abandonment of unfettered jury sentencing discretion in favor of objective, legislatively defined aggravating circumstances designed to guide and focus jury deliberations. *Gregg v. Georgia, supra*, 428 U.S. at 196-198, 206-207. As one principal opinion noted:

> "The Georgia Legislature has made an effort to identify those aggravating factors which it considers necessary

[27]Petitioner intimates that the Court in *Gregg* dealt with "similar circumstances" to those in the present case, since there "the death penalty imposed for murder was upheld even though the death penalty for armed robbery had been set aside . . . [and] [o]ne of the aggravating circumstances . . . was that [the murder] occurred during the commission of another capital felony, armed robbery." (Pet. Br., at 8.) But of course the Georgia Supreme Court's decision that the death penalty would not be carried out for robbery (see *Gregg v. Georgia, supra*, 428 U.S. at 162), had nothing whatever to do with the propriety of submitting robbery to the jury as an aggravating circumstance in a murder prosecution. Both in Gregg's own case and elsewhere, the Georgia Supreme Court has consistently held that armed robbery, rape and kidnapping would continue to be deemed "capital felonies" for the purpose of submission to juries as statutory aggravating circumstances. *Gregg v. State*, 233 Ga. 117, 127, 210 S.E.2d 659, 667 (1974); *see, e.g., Peek v. State*, 239 Ga. 422, 432, 238 S.E.2d 12, 20 (1977). The Court in *Gregg* thus did not face, even tangentially, the issue presented here.

> and relevant to the question whether a defendant convicted of capital murder should be sentenced to death. The jury which imposes sentence is instructed on all statutory aggravating factors which are supported by the evidence, and is told that it may not impose the death penalty unless it unanimously finds at least one of those factors to have been established beyond a reasonable doubt. The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion . . ."

Id. at 221-22 (concurring opinion of Justice White).[28] The Court recognized that, because of the wide range of evidence presented to a sentencing jury under a bifurcated statute, the legislative designation of aggravating circumstances was crucial in avoiding the arbitrariness condemned by *Furman*:

> "[T]he provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. Since the members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given." *Gregg v. Georgia*, *supra*, 428 U.S. at 192.

The dilemma posed by the need to provide lay juries with a wide range of sentencing evidence while simultaneously

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[28] *Accord*: *Proffitt v. Florida*, *supra*, 428 U.S. at 253 ("Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty"); *Jurek v. Texas*, *supra*, 428 U.S. at 270 ("While Texas has not adopted a list of statutory aggravating circumstances . . . its [legislative] action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose.") *See Bullington v. Missouri*, ___ U.S. ___, 68 L.Ed.2d 270, 275 (1981) ("the Missouri statutes contain substantive standards to guide the discretion of the sentencer.")

guiding their consideration of it so as to control against arbitrary capital sentencing was resolved by recourse to carefully constructed, objective, "legislative guidelines," *id.* at 207, which direct and focus the jury's attention as they engage in weighing the significance of the relevant sentencing information which they have received. *Id.* at 197-198.[29]

Inseparable from reliance upon objective legislative standards to avoid arbitrariness is the requirement that the trial court instruct the sentencing jury about those standards, so as to give it accurate "guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision," *Gregg v. Georgia*, *supra*, 428 U.S. at 192.

> "The idea that a jury should be given guidance in its decision making is . . . hardly a novel proposition. Juries are invariably given careful instructions in the law and how to apply it . . . When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations."

Id. at 192-93.

The inclusion of an unconstitutional aggravating circumstance in the sentencing instructions given Stephens' jury critically impaired these procedural protections. His jury was not only licensed to go outside the regular roster of valid sentencing considerations that govern juries at all other Georgia penalty trials; it was affirmatively misdirected to

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[29]The well-established role played by statutory aggravating circumstances in guiding jury discretion is ignored by those Attorneys General who suggest as *amici curiae* that such circumstances form no more than a "threshold" consideration and become "irrelevant" once "one statutorily-defined class is found to be present" (Atty. Gen Br. at 7). See discussion *infra*, at pp. 55-56.

consider in aggravation an unconstitutional circumstance, so held by the Georgia Supreme Court precisely "because it did not set 'sufficiently "clear and objective standards," ' " *Gregg v. Georgia, supra*, 428 U.S. at 166 n.9.

The Georgia statutory procedure approved in *Gregg* requires the jury to evaluate the statutory aggravating circumstances which it finds in the light of any mitigating factors present before deciding upon a sentence. The judge is to "include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any . . . statutory aggravating circumstances . . . supported by the evidence." Ga. Code Ann §26-3102. The jury may impose a death sentence on the basis of a single statutory aggravating circumstance, but "even if aggravating circumstances [are] . . . present, the death penalty *need not* be imposed if the jury [finds] . . . they [are] . . . outweighed by mitigating circumstances," *Coker v. Georgia*, 433 U.S. 584, 589-90 (1977) (plurality opinion) (emphasis added).[30] Moreover, Georgia juries may make a recommendation of mercy that is binding on the trial court, see *Gregg v. Georgia, supra*, 428 U.S. at 197, despite the absence of any mitigating circumstances. Thus, the heart of the jury's deliberative process is its consideration of the weight to be accorded to the totality of the circumstances designated as aggravating, in relation to the mitigating factors present.

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[30] *Accord*: *Proffitt v. Florida, supra*, 428 U.S. at 248, 250 ("At the conclusion of the hearing the jury is directed to consider '[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist' "; "The trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant.") *See Bullington v. Missouri, supra*, 68 L.Ed.2d at 276 ("The jury must consider whether . . . any mitigating circumstances that exist outweigh the aggravating circumstances.")

Since the very purpose of statutory aggravating circumstances is to direct the jury's attention to those factors that "the State, representing organized society, deems particularly relevant to the sentencing decision," *Gregg v. Georgia, supra*, 428 U.S. at 192, it is reasonable to suppose—(and it is, of course, the constitutional premise of the *Gregg* decision)—that such instructions *do* direct and focus the attention of at least some jurors during their deliberations, and therefore that the erroneous instruction given here "may have . . . unduly directed the jury's attention to [Stephens'] . . . prior convictions" (J.A. 95), as the Court of Appeals found. To be sure, no one can retrospectively determine the precise impact on the jury's functioning of such an instruction, but the cognate reasoning in *Gardner v. Florida*, 430 U.S. 349, 359 (1977), seems particularly pertinent:

> "If . . . it is important to use [statutory aggravating circumstances] . . . in the sentencing process, we must assume that in some cases it will be decisive in the [jury's] . . . choice between a life sentence and a death sentence."

The inescapable risk that the instruction to Stephens' jury to consider an unconstitutional aggravating circumstance was a "decisive" factor in its verdict of death requires the invalidation of that verdict.

A final protective feature of the Georgia statute is its requirement that "the sentencing authority . . . specify the factors it relied upon in reaching its decision," *Gregg v. Georgia, supra*, 428 U.S. at 195, in order to provide "the further safeguard of meaningful appellate review," *id.* The Court explained in *Proffitt* that "[i]f a death sentence is imposed," and "the sentencing authority articulates in writing the statutory reasons that led to its decision," those reasons are available to a state's supreme court "which, because of its

statewide jurisdiction, can assure consistency, fairness and rationality in the even-handed operation of the state law," *Proffitt v. Florida*, *supra*, 428 U.S. at 259-60.

The Court has subsequently stressed the importance of ensuring "that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed," *Gardner v. Florida*, *supra*, 433 U.S. at 361, cautioning that "[w]ithout full disclosure of the basis for the death sentence," a "capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia*."[31]

[31]Justice White has intimated that a capital-sentencing system might survive constitutional attack, even if the sentencing deliberations of the jury could not be reconstructed, so long as the state supreme court could assert independently, on the basis of the record evidence, that a death sentence was warranted. *Drake v. Zant*, 449 U.S. 999, 1003 (1980) (opinion of Justice White, dissenting from denial of certiorari) ("The Georgia Supreme Court has held that under Georgia law it has the power to determine whether or not a death sentence should be imposed under these circumstances. As I see it, this does not violate the United States Constitution.") But under the statutory scheme which Georgia has enacted and employs to make the life-or-death decision in all capital prosecutions, it is the jury, not the appellate court which determines whether to impose a death sentence: the *jury* is charged with considering both aggravating and mitigating circumstances to decide if the death penalty is warranted, Ga. Code Ann. § §26-3102, 27-2534.1; *see Gregg v. Georgia*, *supra*, 428 U.S. at 163-66, 197, 207-11, 221-22. This Court accordingly held in *Presnell v. Georgia*, 439 U.S. 14, 16 (1978), that for the Georgia Supreme Court to substitute its judgment for that of the jury would violate "fundamental principles of procedural fairness . . . ." The Court reaffirmed this position in *Godfrey v. Georgia*, *supra*, 446 U.S. at 429, noting that the role of the Supreme Court of Georgia was limited to "independently assess[ing] the evidence of record and determin[ing] that such evidence supports the trial judge's or jury's finding." The Georgia Supreme Court cannot, and *has not purported to*, substitute itself for the jury as an initial sentencer; its affirmance of Stephens' sentence does not rest on any such ground.

(continued)

In Stephens' case, his jury *did* specify those factors on which it relied; those factors included an unconstitutional aggravating circumstance. Thus, an appellate court, reviewing Stephens' sentence, can know to a certainty that his sentence was "imposed under the influence of... an arbitrary factor," *Gregg v. Georgia, supra*, 428 U.S. at 166-67, citing Ga. Code Ann. §27-2537(c)(3). Whether that arbitrary factor was decisive to Stephens' jury cannot be reconstructed. Under these circumstances, vacation of the death sentence is required. As the Fifth Circuit observed in a related context:

> "Guarding against the arbitrary and discriminatory imposition of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to discern whether the improper . . . aggravating factors exerted a decisive influence on the sentencing determination. The guarantee against cruel and unusual punishment demands more."

Henry v. Wainwright, 661 F.2d 56, 59-60 (5th Cir. 1981).

To summarize this reexamination, each of the fundamental procedural safeguards approved in *Gregg*—objective legislative standards; careful jury instructions which provide guidance for the jury's task of weighing the totality of aggravating and mitigating factors; jury articulation of its sentencing rationale as a basis for meaningful appellate sentence review—would go for naught if a sentence could be affirmed despite uncertainty as to the possible influence of an

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(footnote continued from preceding page)

Justice Stevens intimated in *Drake* that it might be permissible for the Georgia Supreme Court, on review, to determine whether undisputed record facts fell within the "core conduct" of a constitutionally valid aggravating circumstance—Ga. Code Ann. §27-2534.1(b)(7). *Drake v. Zant, supra*, 449 U.S. at 1000 (Stevens, J., concurring). Such a holding would not, of course, apply in this case, where an unconstitutional circumstance is at issue.

unconstitutional sentencing instruction. Under circumstances in which "the jury's discretion . . . was not sufficiently channeled . . . [and] the process in which the death penalty was imposed . . . was not 'rationally reviewable'" (J.A. 91), the Court of Appeals was correct in determining that Stephens' "death sentence . . . cannot stand" (*id.*).

II.

WELL-ESTABLISHED PRECEPTS OF DUE PROCESS ALSO COMPEL THE VACATION OF RESPONDENT'S DEATH SENTENCE

Although Eighth Amendment principles suffice to require the invalidation of Alpha Stephens' death sentence, those principles are firmly bolstered by settled Fourteenth Amendment doctrines. The Court of Appeals appropriately drew upon one source of due process authority, *Stromberg v. California*, 283 U.S. 359 (1931), and successive cases (see J.A. 90); we shall shortly examine *Stromberg*'s controlling significance for the present case. Yet behind the *Stromberg* line stand numerous other decisions by the Court dealing with the effects of erroneous jury instructions—especially errors in capital sentencing instructions—which exemplify the Court's continuing concern to assure that jury verdicts will not rest upon infirm foundations which call their integrity into question. These cases demonstrate a longstanding, principled insistence that the process of jury decisionmaking be properly guided by constitutionally adequate instructions from trial courts. That well-developed, fundamental point controls this case.

A. Stephen's Death Sentence Was Properly Vacated Under *Stromberg v. California*

The Court of Appeals noted that in *Stromberg v. California, supra*, this Court held that "if the jury has been instructed to consider several grounds for conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside" (J.A. 90). Concluding that "[t]his settled principle of law applies with particular force in cases in which the death penalty has been imposed" (*id.*), the court found that Stephens' case fell squarely within the rule because "[i]t is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance" (J.A. 90-91).

Stromberg involved a jury charge encompassing at least three theories of criminal liability, each theory embodied in a separate statutory clause aimed at a different possible motive or intention for displaying a red flag.[32] The California appellate court, though "doubting the constitutionality of the first clause" of the statute, upheld Stromberg's conviction by "rest[ing] its decision upon the remaining clauses," *Stromberg v. California, supra*, 283 U.S. at 367. This Court reversed,

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[32]Stromberg had apparently displayed a red flag at a California summer camp. Under §403a of the California Penal Code, it was a felony in California to display a red flag in a public place either (i) "as a sign . . . of opposition to organized government," or (ii) as an invitation or stimulus to anarchistic action, or (iii) "as an aid to propaganda that is of a seditious character," *Stromberg v. California, supra*, 283 U.S. at 361. Another count of the information, charging Stromberg with conspiracy, was not considered by the Court. *Id.*

agreeing that the first clause was unconstitutional and finding that "it is impossible to say under which clause of the statute the conviction was obtained," *id.* at 368, so that the conviction "may have rested upon [the invalid] clause exclusively," *id.* at 370.

Stromberg has since been followed consistently. *See e.g., Williams v. North Carolina*, 317 U.S. 287, 291-92 (1942); *Thomas v. Collins*, 323 U.S. 516, 528-29 (1945); *Cramer v. United States*, 325 U.S. 1, 36 n.45 (1945); *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949); *Yates v. United States*, 354 U.S. 298, 311-12 (1957); *Gregory v. Chicago*, 394 U.S. 111, 113 (1969); *Street v. New York*, 394 U.S. 576, 585-88 (1969); *Bachellar v. Maryland*, 397 U.S. 564, 570-71 (1970).[33] In *Thomas v. Collins* and more recently in *Street v. New York*, the Court made it clear that *Stromberg* is not limited to situations in which the jury's verdict may have rested exclusively on an unconstitutional basis but also reaches situations in which a verdict may have rested on *both* a valid and an invalid ground. Justice Harlan, speaking for the Court, held that

> "even assuming that the record precludes the inference that appellant's conviction might have been based *solely* on [an unconstitutional ground] . . . , we are still bound to reverse if the conviction could have been based upon *both* [an unconstitutional ground] . . . and [a constitutional ground]."

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[33]Those Attorneys General appearing as *amici curiae* suggest that this line of cases "relate[s only] to the statutory abridgment of First Amendment rights" (Atty. Gen. Br. at 15). They are incorrect. *Williams v. North Carolina, supra*, for example, involved a bigamy conviction, and *Cramer v. United States, supra*, a conviction for treason. Neither case turned on First Amendment principles, and the Court has never intimated that *Stromberg* is limited to First Amendment cases.

Street v. New York, *supra*, 394 U.S. at 587 (emphasis in original). For when a jury receives instructions concerning "both a constitutionally protected act and one which may be unprotected, and a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of the fact will have regarded the two acts as 'intertwined' and have rested the conviction on both together," *id.* at 588.

The sentencing verdict returned by Stephens' jury indicates that the jury found two permissible aggravating circumstances. Yet neither of these circumstances, singly or in combination, *required* the jury to impose a death sentence; they merely authorized it.[34] After deliberating on the cumulative weight of these two permissible aggravating circumstances and one unconstitutional aggravating circumstance cited in its verdict, and also on the weight of the mitigating evidence presented, Stephens' jury recommended a death sentence. This recommendation, the ultimate sentencing decision under Georgia law, must thus properly be viewed as a general verdict in which the basis for the jury's over-all determination to take Stephens' life is not revealed. Having reached its three special verdicts of aggravating circumstances, the jury was not obliged to recommend death on the basis of any one or all of them; it was obliged to—and presumably did—consider them all in making its final choice of a life or death recommendation. As in this Court's prior general-verdict cases, there is no way to know that the jury did not rely decisively upon the unconstitutional ground in making that final choice.

But the *risk* that is may have done so—the "unacceptable danger" described in *Street v. New York*, *supra*, 394 U.S. at

[34]By contrast, if the jury in *Stromberg* had shown by its verdict that it had found her to have displayed a red flag as an invitation or stimulus to anarchic action or in aid of seditious propaganda, a guilty verdict was *required* by the applicable California statute and jury instructions.

588—is revealed as a certainty by the jury's verdict here. The jury expressly found the unconstitutional circumstance in its verdict, and to that extent at least considered it. This makes the case a stronger one for distrust of the jury's ultimate general verdict than either *Stromberg* or *Street*; thus, the Court of Appeals correctly held that the verdict could not stand consistently with those cases and the others in the *Stromberg* line.[35]

B. Other Non-Death Cases And Cases Decided By This Court In Its Supervisory Role Demonstrate The Correctness Of The Court Of Appeals' Decision

The Court's Eighth Amendment and Due Process Clause opinions have not sprung from a legal vacuum. Over the course of the past half-century, the Court has wrestled with jury instruction issues in a wide variety of settings; many of the standards and procedures now constitutionally required were first formulated by the Court in its supervisory role within the federal system. Others were advanced as constitutional principles in non-death cases. The vacation of Stephens' death sentence has a well-established foundation in these earlier cases.

For example, in *Bollenbach v. United States*, 326 U.S. 607 (1946), the Court reviewed a conspiracy conviction for

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[35]For obvious reasons, neither the petitioner nor *amici curiae* have suggsted that the fact that Stephens' case arises in a sentencing context, rather than a guilt context, makes a constitutional difference. This Court has unequivocally held that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause," *Gardner v. Florida* 430 U.S. 349, 358 (1977); *see e.g., Green v. Georgia*, 442 U.S. 95, 97 (1979); *Presnell v. Georgia*, 439 U.S. 14, 16 (1978); *see also Bullington v. Missouri*, ___ U.S. ___, 68 L.Ed.2d 270, 282-84 (1981).

interstate transportation of stolen securities. The matter at issue was the propriety of an admittedly dubious jury instruction suggesting that the possession of stolen securities in another State raised a presumption that the securities had been transported by the possessor. The Government urged the Court to "sustain the conviction on the assumption" that, despite the erroneous instruction, overall "the jury was properly guided," *Bollenbach v. United States*, *supra*, 325 U.S. at 613. Justice Frankfurter for the Court flatly rejected this argument:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal. The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks . . . It would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide."

Id. at 613-14.[36]

The Court in *Bollenbach* also rejected the Government's argument that, regardless of the erroneous instruction, the

[36]In *Bihn v. United States*, 328 U.S. 633, 638 (1946), the Court, citing its earlier opinion in *McCandless v. United States*, 298 U.S. 342, 347 (1936), suggested that "'an erroneous [charge] . . . which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial' " (emphasis in original).

evidence in the record clearly proved the defendant was guilty. "[T]he question," the Court insisted, "is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials," *id.* at 614.[37] Similar arguments have been advanced in the present case to sustain Stephens' death sentence; this Court's answer in *Bollenbach* is equally appropriate here.

More recently, the Court has followed a similar approach in two state criminal cases involving jury instructions challenged on constitutional grounds.

The trial court in *Sandstrom v. Montana*, 442 U.S. 510, 513 (1979), had instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." This instruction was not unconstitutional if viewed as creating a permissive inference; but, viewed as creating a mandatory or burden-shifting presumption, it was unconstitutional. The court reversed Sandstrom's conviction, reasoning that if a "reasonable juror" could have given the instruction an unconstitutional interpretation, the Court could not "discount the possibility that Sandstrom's jurors actually did proceed upon" such an interpretation. *Id.* at 519.

Here too, the Court "cannot discount the possibility that [Stephens']... jurors actually did proceed" to impose a death sentence not solely on account of the two permissible statutory aggravating circumstances found, but only upon consideration of the cumulative impact of all three aggravating circumstances, including the unconstitutional one. "[A]

[37]The Court restated this principle in *United Brotherhood of Carpenters & Joiners v. United States*, 330 U.S. 395, 410 (1947): "No matter how clear the evidence, [a defendant is]... entitled to have the jury instructed in accordance with the standards which [the legislature] . . . has prescribed. To repeat, guilt is determined by the jury, not the court."

reasonable juror," in short, "could well have been misled," *id.* at 517, to rely at least in part upon the unconstitutional aggravating circumstance submitted for the jury's consideration by the instructions which Stephens' trial court gave.

In *Hicks v. Oklahoma*, 447 U.S. 343 (1980), the Court dealt with a jury instruction issue bearing a still closer resemblance to Stephens'. The *Hicks* jury had been instructed that, under an habitual offender statute, the jurors were to assess the defendant's punishment at 40 years imprisonment if they found him guilty. The defendant was convicted and given a 40-year sentence. Thereafter the Oklahoma Court of Criminal Appeals declared the habitual offender statute unconstitutional. The prosecution nevertheless sought to sustain Hicks' sentence, contending that "the petitioner was not prejudiced by the impact of the invalid statute, since his sentence was within the range of punishment that could have been imposed in any event," *Hicks v. Oklahoma, supra*, 447 U.S. at 345. This Court disagreed. It held that Oklahoma could not deny the defendant the right to a sentence imposed by a properly instructed jury "simply on the frail conjecture that [such] a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law." *Id.* at 346 (emphasis in original).

Alpha Stephens likewise was tried by a jury which was told that it could take into consideration in assessing punishment a statutory aggravating circumstance later held unconstitutional. The State of Georgia contends here, as did the State of Oklahoma in *Hicks*, that because other statutory aggravating circumstances were found, Stephens might well have received the same punishment even had his jury been properly instructed. *Hicks*' answer is equally applicable: "the frail

conjecture that [Stephens'] . . . jury *might* have imposed a sentence equally harsh" cannot sustain his death sentence consistently with the demands of due process.

This result is particularly appropriate in view of the Court's longstanding concern that all requirements of procedural fairness be scrupulously observed where life is at stake. Nowhere has this concern been more sharply focused than in cases involving questionable capital sentencing instructions. In *Calton v. Utah*, 130 U.S. 83 (1889), for example, the Court vacated a death sentence because the defendant's jury "were not informed as to their right, under the statute, to recommend imprisonment for life . . . in place of the punishment of death," *id.* at 86. Citing "the fundamental rules obtaining in the trial of criminal cases involving life," *id.* at 87, the Court rejected arguments by the Government that it could be "presumed that [the jurors] . . . were aware of their right" to give a life sentence, and that reversal was unwarranted since the jurors might have decided to impose a death sentence even had they been properly instructed. *Id.* at 86.

Subsequently, in *Winston v. United States*, 172 U.S. 303 (1899), the Court reversed death sentences which had been imposed in the absence of jury instructions adequately informing the jurors of their discretion to choose a life sentence. The Court noted that it had consistently "upheld and guarded" the sentencing rights of capital defendants "as against the possible effect of any restriction or omission in the . . . instructions of the judge presiding at the trial." *Id.* at 312. The same concern was demonstrated again in *Andres v. United States*, 333 U.S. 740 (1948), where the jury had received an ambiguous instruction concerning the requirement of unanimity in recommending a sentence. After examining this instruction, the Court concluded that its language might have misled reasonable jurors regarding their

statutory power to make a non-unanimous recommendation of mercy. Andres' death sentence was accordingly reversed. "In death cases," the Court said, "doubts such as those presented here should be resolved in favor of the accused." *Id.* at 752.[38]

The principal teaching of all of these cases is that jury instruction on crucial issues, especially instruction relating to the procedures that a jury must observe in the process of capital sentencing, is so fundamental an element of due process that the risks created by instructional error cannot be countenanced.[39] With his life at stake, Alpha Stephens is entitled to greater assurance than any *post hoc* speculation can provide, that his sentencing jury did not accept the explicit invitation tendered to it by his trial judge, to base a death sentence at least in part upon an unconstitutional aggravating circumstance.

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[38]This special emphasis on procedural fairness in death cases has also been a recurring theme in decisions not involving jury instructions. *See e.g., Powell v. Alabama*, 287 U.S. 45, 71-72 (1932); *Stein v. New York*, 346 U.S. 156, 196 (1953); *Williams v. Georgia*, 349 U.S. 375, 391 (1955); *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (Frankfurter, J. concurring); *id.* at 77 (Harlan, J., concurring).

[39]Neither *Cupp v. Naughton*, 414 U.S. 141 (1973), nor *Henderson v. Kibbe*, 431 U.S. 145 (1977) is to the contrary. *Cupp* concerned a charge which was found by this Court not to be unconstitutional, but to involve at most a "tangential undercutting . . . as a theoretical matter," of the presumption of innocence elsewhere "clearly stated" in the jury instructions. *Cupp v. Naughton, supra*, 414 U.S. at 149. By contrast, the aggravating-circumstance instruction given to Stephens' jury was acknowledged to be unconstitutional by the Georgia Supreme Court. *Henderson v. Kibbe* involves, not affirmative "misstatement of the law," *Henderson v. Kibbe, supra*, 431 U.S. at 155, such as occurred in Stephens' case, but rather an "omission" which the Court determined was not critical in light of other, largely overlapping instructions given to the jury.

C. A Majority Of State Courts Which Have Considered This Issue Concur With The Judgment Of The Court Of Appeals

It is ironic that *amici* should choose to castigate the Court of Appeals' decision below as "a classic instance of an unjustified and hypertechnical reversal of a death sentence" by a federal appellate court, Atty. Gen. Br., at 22. In fact, a majority of state appellate courts which have addressed the issue have agreed with the Fifth Circuit that a capital jury's partial reliance on an impermissible aggravating circumstance requires the reversal of the defendant's death sentence. Alabama: *Cook v. State,* 369 So.2d 1251, 1255-57 (1979); *Bufford v. State*, 382 So.2d 1162, 1174-75 (Ala. Cr. App. 1980); Arkansas: *Williams v. State*, 621 S.W.2d 686, 687-88 (1981); Delaware: *Whalen v. State*, 395 A.2d 108 (1980);[40] Idaho: *State v. Osborn*, 631 P.2d 187, 198-99 (1981);[41] Illinois: *People v. Brownell*, 404 N.E.2d 181, 195

[40]The Supreme Court of Delaware noted in *Whalen* that it had held in a earlier case that a statutory aggravating circumstance that the victims were 'elderly' and 'defenseless' (also submitted to *Whalen*'s jury) was unconstitutionally vague. The Court held that while Whalen "was found guilty of rape, itself a statutory aggravating circumstance, we are not prepared to assume the defendant was not prejudiced by this error." The Court also faulted the jury's failure to designate in its sentencing verdict any of the aggravating circumstances which it found.

[41]The Supreme Court of Idaho held in *Osborn* that "the inclusion of [an impermissible aggravating circumstance] . . . would be ill-advised due to its possible impact on the process of balancing the aggravating circumstances found . . . and the mitigating circumstances," *State v. Osborn, supra*, 631 P.2d at 198. However, because Osborn had been sentenced by a trial judge who entered written findings of fact and conclusions of law and specifically stated that the factor at issue had "not [been] relied upon as a statutory aggravating circumstance," *id.*, the Court declined to find error. (Osborn's death sentence was reversed on other grounds.)

(1980); North Carolina: *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551, 568 (1979); *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569, 587-88 (1979); *State v. Irwin*, ____ N.C. ____, 282 S.E.2d 439, 448-49 (1981); *cf. State v. Taylor*, ____ N.C. ____, ____, ____ S.E.2d ____, ____ (1981);[42] Tennessee: *State v. Moore*, 614 S.W.2d 348, 351-52 (1981); Wyoming: *Hopkinson v. State*, 632 P.2d 79, 171-72 (1981). *See also* California: *People v. Green*, 164 Cal. Rptr. 1, 609 P.2d 468, 509-14 (1980);[43] South Carolina: *State v. Gilbert*,

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[42]The Supreme Court of North Carolina has adopted the rule that reversal of a death sentence imposed in partial reliance on an impermissible aggravating circumstance is required if "there is a *reasonable possibility* that the erroneous submission of an aggravating circumstance tipped the scales in favor of the jury finding that the aggravating circumstances were 'sufficiently substantial' to justify imposition of the death penalty." *State v. Irwin, supra*, ____ N.C. at ____; 282 S.E.2d at 449. Under that standard, the North Carolina Supreme Court has reversed every death sentence in which an erroneous aggravating circumstance has ben relied upon except the one in *State v. Taylor, supra*, where the erroneous aggravating circumstance was the accompanying felony used at the guilt phase to convict the defendant on a felony-murder theory. (The felony aggravating circumstance was deemed improperly submitted under the North Carolina Supreme Court's rule that a felony used to support a felony-murder may not be resubmitted as an aggravating circumstance at the sentencing phase.)

[43]In *People v. Green*, the California Supreme Court rejected one of the "special circumstances" which constitute a prerequisite for imposition of a death sentence on the ground that it could not determine whether the jury relied upon two legally insufficient bases for such a finding or on a third, legally adequate basis. *Id.* at 509. The Court applied California's "settled and clear" rule on appeal that "when the prosecution presents its case to the jury on alternative theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." *Id.* at 510. Since the only other special circumstance present was also found to have been invalid on a separate ground, see *id.* at 506, the Court did not have to apply its settled rule to the precise issue presented in *Stephens*.

___ S.C. ___, 283 S.E.2d 179 (1981).[44] Only three (or perhaps as many as five) states besides Georgia have reached a contrary result: Arizona: *State v. Clark*, 126 Ariz. 428, 616 P.2d 888, 895-97 (1980); Louisiana: *State v. Monroe*, 397 So.2d 1258, 1274-76 (1981); Nebraska: *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867, 872-76 (1977). *See also* Florida: *Brown v. State*, 381 So.2d 690, 696 (1980);[45]

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[44]In *Gilbert*, the Supreme Court of South Carolina considered at length whether one of two aggravating circumstances relied upon by the defendant's jury should have been submitted. Although the majority concluded that the circumstance was properly submitted, its entire discussion appears to assume that, had the submission been improper, the defendant's death sentence would have had to be vacated. Justice Harwell dissented, contending that the second aggravating circumstance should not have been submitted to the jury. He went on to state: "Any contention that the error is harmless since one other aggravating circumstance was found to exist beyond reasonable doubt is without merit. The jury can recommend life even if an aggravating circumstance is properly established. Thus, we can only speculate as to whether this jury would have recommended death had only the armed robbery circumstance been submitted to it for consideration. This speculation is the sort of arbitrary factor which is intolerable in a case of this nature," *State v. Gilbert, supra*, ___ S.C. ___, 283 S.E.2d at 184 n.3.

[45]In *Elledge v. State*, 346 So.2d 998 (1977), the Florida Supreme Court held that in cases where at least some mitigating circumstances were found, it could not know the effect of the submission of an impermissible aggravating circumstance and "since a man's life [was] at stake" found itself "compelled to return the case to the trial court for a new sentencing trial." *Id.* at 1003. In *Brown*, the Supreme Court of Florida distinguished *Elledge*, saying that, because of the clarity of the sentencing judge's findings on aggravating and mitigating circumstances " 'we can know' that the result of the weighing process would not have been different had the impermissible factors not been present." *Brown v. State, supra*, 381 So.2d at 696.

Missouri: *State v. Mercer*, 618 S.W.2d 1 (1981).[46]

State court reluctance to affirm a tainted capital sentencing verdict is exemplified in *Williams v. State*, where the Arkansas Supreme Court considered a death sentence imposed on a penitentiary parolee who had burglarized the home of his former girlfriend, stabbing her in the arm and back and fatally stabbing her paramour 18 times. The State submitted two valid aggravating circumstances to the jury; it also submitted as a third circumstance that "the person previously committed another felony an element of which was the use or threat of violence to another person," *Williams v. State, supra*, 621 S.W.2d at 68. This third circumstance was factually based upon evidence of a prior burglary conviction. Because burglary under Arkansas law does not necessarily involve a threat of personal violence, the Arkansas Supreme Court held that the third aggravating circumstance should not have been submitted to the jury. Despite the existence of two valid aggravating circumstances and despite an absence of mitigating evidence, the court refused to uphold the death sentence:

> "We cannot, as the State urges us to do, hold the error to be harmless on the theory that the jury found two other aggravating circumstances and no mitigating ones. The jury must find not only that the aggravation outweighs the mitigation but also that the aggravating circum-

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[46]The Supreme Court of Missouri did not directly resolve this issue in *Mercer* since it held that "the evidence supports the jury's findings on both aggravating circumstances" presented, *id.* at 10 n.5. The Court did observe in a footnote that its statute was similar to that of the state of Georgia, citing the Georgia cases on this issue, but the Missouri court also cited the contrary authority, including the opinion of the Court of Appeals in *Stephens*, without expressly stating which line of cases it would follow when the issue was squarely presented.

> stances 'justify a sentence of death beyond a reasonable doubt' §41-1352(1)(c). In a death case we are not in a position to speculate about what the jury might have done if it had found only two aggravating circumstances instead of three."

Id.[47]

The Supreme Court of Tennessee also declined to speculate on the effects of an improper aggravating circumstance in *State v. Moore*, a case closely parallel to Stephens'. The evidence in *Moore* established as a valid aggravating circumstance that the defendant had first kidnapped his 18-year-old victim, then shot him repeatedly and mutilated his body. The State also submitted as a second aggravating circumstance that the defendant had a "prior conviction involving the use or threat of violence," and offered evidence of his prior convictions for arson and second degree burglary. The Tennessee Supreme Court, observing that under Tennessee law these crimes did not necessarily involve the use or threat of violence, held that the submission to the jury of this aggravating circumstance was erroneous. Although the court acknowledged that evidence of these convictions was admissible during the sentencing phase, it observed that "these crimes were not properly shown to quality as [statutory] aggravating circumstances . . . Yet they were offered *for that very purpose* and the jury was told that one of them did

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[47]The Attorneys General who have appeared as *amici curiae* describe *Williams* as a case "wherein the invalid aggravating circumstance caused the admission of otherwise inadmissible evidence," Atty. Gen. Br. at 14 n.6. Nothing in the *Williams* opinion supports their proposition that the burglary conviction was inadmissible during the sentencing phase. The Arkansas Supreme Court held only that "this particular *aggravating circumstance* . . . should not have been submitted without proper supporting proof," *Williams v. State*, *supra*, 621 S.W.2d at 687 (emphasis added), not that the burglary conviction was inadmissible.

qualify," *State v. Moore*, 614 S.W.2d at 352 (emphasis added). Since the Court had "no way of knowing whether the jury would have imposed the death penalty had they not been permitted to so consider this evidence (*i.e.*, as constituting "statutory aggravating circumstances") in their weighing process," *id.*, the court vacated the defendant's death sentence.

The Supreme Court of Illinois in *People v. Brownell* expressed a separate but related idea—the impropriety of a reviewing court's usurpation of the sentencing authority's role—when it vacated the death sentence imposed by a trial judge on a defendant who had kidnapped, raped and strangled a young hitchhiker. Acknowledging that the trial judge had properly relied on the aggravated kidnapping and rape as aggravating circumstances, the Illinois Supreme Court went on to hold that another aggravating circumstance (that the victim was an eyewitness) had not been established within the meaning of the statute, and concluded:

"[W]e deem it necessary to a complete and fair sentencing hearing that we vacate the sentence of death . . . The partial sentencing hearing is essential because of the profound importance we attach to the trial court's role in weighing aggravating and mitigating factors. In this instance, the trial court weighed an aggravating factor which we have concluded figured erroneously in the court's sentencing decision. We have now removed that factor from the scale. Whether the scale will remain stable or will tip as a result of our conclusion is initially for the trial court to determine."

Id. at 195.

III.

PETITIONER AND *AMICI CURIAE* PRESENT NO VALID ARGUMENT FOR REVERSING THE JUDGMENT OF THE COURT OF APPEALS

Petitioner Zant advances two reasons why the judgment of the Court of Appeals should be reversed: first, that the Fifth Circuit misapplied *Stromberg v. California* (Pet. Br., at 10); second, that the Fifth Circuit misunderstood the law of Georgia concerning the admission of nonstatutory aggravating circumstances during the sentencing phase (*id.*). We will deal with each of these arguments in turn.

Petitioner argues that *Stromberg* is inapplicable here because it involved "a general verdict," Pet. Br. at 10, while the Stephens verdict was "not a general verdict" inasmuch as "[t]hree statutory aggravating circumstances were specified in writing by the jury," *id.* This argument is incorrect even as an exercise in nomenclature: the jury's recommendation that Stephens be punished with death was the prototype of a "general verdict" since it was neither legally required nor adequately explained by the three special verdicts of aggravating circumstances which the jury also found.[48] In any

[48] A general verdict is one "whereby the jury finds either for the plaintiff or for the defendant in general terms " BLACK'S LAW DICTIONARY 1731 (4th ed. rev. 1968), as "distinguished from a special verdict . . . by which the jury finds facts only . . . leaving to the court the application of the law to the facts thus found," *id.* Although Stephens' jury was required to indicate its findings on certain facts, viz. the statutory aggravating circumstances, a death sentence did *not* follow as a matter of Georgia law from the findings of those facts. As petitioner concedes, "a statutory aggravating circumstance is a prerequisite to consideration of imposition of a sentence of death; it is not tantamount to imposing the death penalty," Pet. Br. at 8. Stephens' jury "impos[ed] the death penalty" by its recommendation of death; this ultimate recommendation was a general verdict in both form and substance.

event, nomenclature is no substitute for analysis; analysis obviously reveals that the evil identified in *Stromberg*—the inability of a reviewing court to satisfy itself that the jury did not rely on an unconstitutional ground—is stronger here than in *Stromberg* precisely *because* Stephens' jury did specify the unconstitutional aggravating circumstance, along with two constitutional aggravating circumstances, in its verdict. As we have seen, *Street v. New York, supra* holds that "we are . . . bound to reverse if the conviction could have been based upon *both* [the unconstitutional ground] . . . and [the constitutional ground]," 394 U.S. at 587 (emphasis in original), in view of the "unacceptable danger" which exists in such a case "that the trier of fact will have regarded the two [factors] . . . as 'intertwined' and have rested the conviction on both together," *id.* at 588. That danger is all the more inescapable under a capital sentencing procedure which requires the jury to consider together all aggravating and mitigating factors, to weigh and evaluate them as a totality.[49]

Petitioner's second argument is comprised of several insufficient parts. He focuses primarily on the Court of Appeals' remark in its initial opinion, that "[t]he presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of [Stephens] which otherwise would not have been before it," Pet. Br., at 10-11. Petitioner is correct that while the Georgia Legislature did not choose to make prior felony convictions a statutory aggravating circumstance, Georgia law does permit

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[49]It is foreign to the entire nature of capital jury deliberations to suggest, as *amicus curiae* The Washington Legal Foundation, intimates, that in a capital case, "the trier of fact considered each count on its own merits and separately from the others," WLF Br. at 11, citing *Street v. New York, supra*, 394 U.S. at 588. The capital jury's mandate is precisely to the contrary.

the introduction of evidence of them during capital sentencing proceedings.[50] However, the Court of Appeals' decision below is not founded on the receipt of allegedly improper evidence, and the now-corrected misstatement in its original opinion is therefore unimportant. As that court indicated from the outset (J.A. 91), and made explicit on rehearing (J.A. 95-96), the principal constitutional infirmity in Stephens' case is that "[t]he instruction on the invalid circumstance may have *directed the jury's attention*" (J.A. 91) or "unduly directed the jury's attention" (J.A. 95) to his prior convictions.

Petitioner dismisses this latter concern, contending that "because the evidence submitted in support of [the unconstitutional aggravating circumstance] . . . was admissible evidence," Pet. Br. at 12, the judge's charge to the jury to consider it as an aggravating circumstance "work[ed] absolutely no effect upon the jury's process of deliberation in reaching their recommendation" of death, Pet. Br. at 13. Viewed as a statement of fact, this contention is without foundation: The jury's written verdict states that it did find the unconstitutional circumstance, together with two others; the record contains no indication of the extent of its influence on the jury. Viewed as surmise, petitioner's contention runs counter to this Court's long-held and well-grounded assumptions that "under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and his lightest word or intimation is received with

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[50] Although the constitutionality of such a practice is not free from doubt, it is not an issue in this case. *Cf. Henry v. Wainwright*, 661 F.2d 56, 58 (5th Cir. 1981), (the practice of "permitting consideration of nonstatutory aggravating factors violates the eight and fourteenth amendments because it fails adequately to channel the jury's discretion in determining whether to impose the death penalty").

deference, and may prove controlling," *Starr v. United States,* 153 U.S. 614, 626 (1894). " '[T]he very purpose' of a jury instruction is to direct the jurors' attention to important legal concepts," *Carter v. Kentucky,* 450 U.S. 288, 299 (1981); "it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it," *Bollenbach v. United States,* 326 U.S. 607, 613 (1946).

Petitioner offers no plausible explanation for the place of jury instructions in capital sentencing proceedings if not to focus and direct the jury's attention on those factors the legislature has deemed of special significance.[51] Objective jury guidance is the central message of *Furman*, the central procedural safeguard endorsed in *Gregg*. Petitioner discusses neither case; indeed, he conspiciously avoids dealing at all with the Eighth Amendment foundations of the Court of Appeals' decision.

The Attorneys General appearing as *amici curiae*, however, do attempt to fashion a theory which would reconcile the strict procedural demands of the Eighth Amendment with the inescapable fact that Stephens' jury was erroneously instructed. Their theory requires a reinterpretation of the entire nature of the capital sentencing process as described by this Court in its prior opinions and as expounded by almost every

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[51] *Amici curiae* appear to suggest that "the argument of counsel" might result in focusing on the jury's attention on the appropriate legislative criteria (Atty. Gen. Br., at 18). As noted above (p. 14, *supra*), the State failed to transcribe the arguments of counsel, so the effect of arguments of counsel in this instance can never be known. In any case, the Court has often noted that "[i]t [is] . . . the duty of the court to safeguard [a] petitioner's rights, a duty only it could have performed reliably," *Taylor v. Kentucky*, 436 U.S. 487, 489 (1978). Stephens' right to jury deliberations conducted in compliance with the Constitution "cannot be permitted to hinge upon a hope that defense counsel will be a more effective advocate . . . than the prosecutor," *id.*

state court which has addressed the question. This radical reinterpretation requires the *amici* to postulate "two entirely different meanings" for the term "aggravating circumstances," as employed in state capital statutes, the different meanings varying "according to the context in which [they are] . . . used," Atty. Gen. Br., at 12.[5] The crux of *amici*'s new theory is that:

> "[t]he sole significance of statutory aggravating circumstances is to determine, at the threshold of the sentencing deliberation, whether the death penalty *may* be imposed . . . Once this determination is made (and assuming that an aggravating circumstance is found) the issue is whether the death penalty *should* be imposed, and the language of the statutory aggravating circumstances have nothing to do with this question."

Atty. Gen. Br., at 13 (emphasis in original).

If these *amici* are correct, it is extraordinary that this Court, in its many cases analyzing capital sentencing procedures since 1976, has never perceived the point—indeed, that the Court has often those procedures in a fashion which is wholly inconsistent with the *amici*'s theory (see discussion, *supra*, pp. 22-30). It is even more extraordinary that state supreme courts have not described their own capital statutes in this fashion, and have not required trial courts to give jury instructions which impart this view of the jury's sentencing responsibilities. (Stephens' jury was not so instructed, of course.) *Amici*'s theory also raises a host of unanswerable questions about current capital sentencing practices. Why do prosecutors request a charge on more than one aggravating circumstance in cases where the evidence supporting one

[5]The Attorneys General confess that "[t]he ambiguity in the term" which is made necessary by their novel theory is present "in the laws of many states," Atty. Gen. Br., at 12 n.5, but it locates one statute—that of the State of Delaware—whose use of the term arguably coincides with that the Attorneys General now propose to adopt. *Id.*

factor (such as Stephens' escape from custody) is undisputed? Why are capital juries required to return verdicts indicating *each* aggravating circumstance found, rather than a single "threshold" circumstance? Why have so many state appellate courts, faced with one invalid circumstance in cases where multiple circumstances were found by the jury—agreed that the proper course is to vacate the death sentence imposed?

In truth, *amici*'s elaborate theory has been constructed in phantasmagoria. It does not reflect the way in which capital statutes have been understood by the legislatures that have drafted them, by the judges that have interpreted them, or by the juries that have applied them. *Amici*'s tortuous efforts simply demonstrate that there is no plausible way to reconcile the Eighth Amendment's procedural demands with a death sentence imposed in reliance upon unconstitutional sentencing instructions.

Petitioner (Pet. Br., at 12) and *amici curiae* (Atty. Gen. Br., at 18; WLF Br., at 13, 15) launch one additional, alternative attack, condemning the Court of Appeals for "attempt[ing] . . . to retrospectively enter the jury room and speculate whether or not the jury's deliberations were correctly concluded," Atty. Gen. Br., at 18. Yet, surely it is these parties who are asking the Court to speculate—to indulge in the sheer conjecture that the improper instruction given Stephens' jury made no difference, that Stephens would inevitably have received a death sentence without it. The Court of Appeals, acting faithfully to this Court's "settled principle . . . that the death penalty may not be imposed under sentencing procedures that create a substantial risk" of arbitrariness (J.A. 90), declined the invitation to engage in these conjectures. Instead, it properly held that Stephens should at last be given the right to which the Eighth and Four-

teenth Amendments[53] entitled him from the outset: a fair determination by a jury, instructed in compliance with Georgia law, of the question whether he will live or die.

The "policy" arguments put forward by *amici curiae* in closing (Atty. Gen. Br., 19-23; WLF Br. 15-20) merit scant response. The Court well understands that it sits to decide cases, not to "send messages" in response to the popular will.[54] The Court has carefully fashioned a system of procedural protections in capital cases, mindful of the needs to protect both individual defendants and society. The trial court in Stephens' case unmistakably violated those pro-

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[53]The Attorneys General appearing as *amici curiae* have also raised the perplexing claim that, since "the sentencing of respondent was totally in compliance with the procedural requirements stated in the decisions in this Court," Atty. Gen. Br., at 18, the issues before this court "do not impinge upon federal constitutional rights" and thus lie "far beyond the scope of legitimate review in an appeal from the denial of a federal habeas petition" (*id.*).

What the Attorneys General mean by "totally in compliance with procedural requirements" is unclear; no party has ever disputed that Stephens' jury received a jury instruction held to have been unconstitutionally vague. Stephens' discussion of both the Eighth Amendment violation (see pp. *supra*) and the independent Fourteenth Amendment violation (see pp. *supra*) occasioned by submission of this erroneous jury instruction clearly suffices to demonstrate a constitutional basis for federal habeas corpus review. The State of Georgia has at no point during these proceedings ever asserted the defense that Stephens was raising noncognizable, non-constitutional claims.

[54]Those Attorneys General who have accused the Court of Appeals of adherence to "technical legal niceties which have no reasonable relation to the validity of the sentencing process," (Atty. Gen. Br., at 8)—and the Washington Legal Foundation, which speaks repeatedly of "an all-knowing, over-arching Federal judiciary" (WLF Br. at 7; see 20)—ought at least to have fully revealed the extent to which state supreme courts have joined in the judgment of the Court of Appeals before they so vigorously lambasted the federal bench.

cedures by injecting an impermissible consideration into the jury's deliberations. The Court of Appeals' judgment vacating Stephens' death sentence was the only appropriate constitutional response under the well-defined Eighth Amendment and Due Process standards established by this Court.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

JAMES C. BONNER, JR.
Prisoner Legal Counseling Project
475 North Lumpkin Street
Athens, Georgia 30601
JACK GREENBERG
JAMES M. NABRIT, III
JOEL BERGER
JOHN CHARLES BOGER
DEBORAH FINS
JAMES S. LIEBMAN
10 Columbus Circle
New York, New York 10019
ANTHONY G. AMSTERDAM
New York University Law School
New York, New York 10012
Attorneys for Respondent

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No. 81-89

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WALTER ZANT,
Warden, Georgia Diagnostic and Classification Center,
Petitioner,

v.

ALPHA OTIS O'DANIEL STEPHENS,
Respondent.

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATES OF ALABAMA, CALIFORNIA, FLORIDA, MISSOURI NORTH CAROLINA, SOUTH CAROLINA, UTAH IN SUPPORT OF PETITIONER, AMICI CURIAE

JOHN ASHCROFT
Attorney General

JOHN M. MORRIS III
Assistant Attorney General

P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys of Record

KELLY PRESS, INC., 201 S. Eighth St., Columbia, Missouri Dial 314/449-4163

QUESTION PRESENTED

When a sentence of death is imposed, and when more than one aggravating circumstance is found to warrant the imposition of the death penalty, is the sentence to be vacated because one of the aggravating circumstances is set aside?

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OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Georgia, denying the respondent's petition for a writ of habeas corpus, is unreported and appeared in the Appendix of petitioner's petition for a writ of certiorari. The opinion of the United States Court of Appeals for the Fifth Circuit, reversing the decision of the District Court insofar as it left standing the sentence of death and remanding the cause for further proceedings, is reported as

Stephens v. *Zant*, 631 F.2d 397 (5th Cir. 1980). The Fifth Circuit's modification of its opinion and denial of the petitioner's motion for rehearing is reported at 648 F.2d 446 (5th Cir. 1981).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 26, 1980, and the petitioner's motion for rehearing was denied on June 18, 1981. The petitioner's petition for a writ of certiorari was filed in this court on July 10, 1981, and certiorari was granted on October 5, 1981. The jurisdiction of this Court was invoked by petitioner under 28 U.S.C. § 1254(1).

INTEREST OF THE AMICI CURIAE

The above-listed states, by and through their respective Attorneys General (see Appendix), respectfully offer the present brief as *amici curiae*, in support of the position of the petitioner in this cause. All of the states joining in this brief have laws providing for the imposition of the death penalty, which laws require the sentencing authority to specifically find at least one statutory aggravating circumstance before a sentence of death may be imposed. The precise issue raised in the present cause has either arisen or may arise in all of these states. For this reason, the *amici* have a substantial and continuing interest in cases such as that at bar which address the present issue.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Eighth Amendment to the United States Constitution reads as follows:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

2. The Fourteenth Amendment to the United States Constitution reads as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. 28 U.S.C. § 2254(a) reads as follows:

> "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws and treaties of the United States."

STATEMENT OF THE CASE

The respondent, Alpha Otis O'Daniel Stephens, was convicted of murder on January 21, 1975, following a trial by jury in the Superior Court of Bleckley County of the State of Georgia (Petitioner's Exhibit 1—hereinafter Ex. 1[1]—at pp. 11-12). After a separate hearing on the issue of punishment, the jury imposed a sentence of death (Ex. 1 at 12-13).

The facts relevant to this conviction and sentence are as follows: in 1973, a year before the murder presently at issue, the respondent committed a murder, an armed robbery and four burglaries in Twiggs County, Georgia (Ex. 4 at

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[1]Petitioner's Exhibits 2 and 3, the trial transcript, will hereinafter be identified as "T.Tr.".

12-15). He was apprehended and pleaded guilty to the four burglaries on November 16, 1973, for which he received four concurrent terms of three years imprisonment (Ex. 4 at 13-15). While in custody pursuant to these convictions, respondent escaped from confinement, was recaptured and was returned to a county jail to await trial on the escape charge (Ex. 1 at 25; T.Tr. 117, 194). On August 19, 1974, respondent escaped from the county jail (Ex. 1 at 25; T.Tr. 117-118, 194-195, 214, 316). After escaping, respondent stole a car and drove to Macon, Georgia, where he stole another vehicle, drove to a nearby county and committed a burglary (T.Tr. 116-119, 194-196, 214, 346); thereafter, he stole a third car and committed an armed robbery and several burglaries (T.Tr. 119, 196-197, 215, 347; Ex. 4 at 10). Respondent then went to Atlanta, where he pawned a stolen pistol, returned to Macon, and on August 21, 1974, he went to the home of Charles Asbell in Twiggs County (T.Tr. 61, 69-70, 119, 122, 198-199, 216-217, 347-348).

Respondent broke into Charles Asbell's home (Asbell was absent) and took a number of weapons, including a .357 Magnum pistol, which he proceeded to load (T.Tr. 62-63, 65-66, 120, 199). After respondent loaded the booty into his stolen car and as he was attempting to start the vehicle, Roy Asbell (who was Charles Asbell's father and who lived nearby) drove up (T.Tr. 64, 120, 199, 217, 348). When this occurred (and, according to respondent, after Mr. Asbell had made a racial slur), respondent ran to Asbell's car, pulled him from the vehicle and struck him in the face several times (T.Tr. 120, 199, 217, 348); respondent is 6'2" in height, and Asbell was 5'6" and crippled as a result of a tractor accident which broke his pelvis in five places (T.Tr. 56-57, 334). When Asbell offered respondent money to spare his life, respondent took the money and then kicked and pistol-whipped Asbell, inflicting a broken jaw and several skull fractures (T.Tr. 46, 49, 120-121, 200, 217). Respondent

then drove Asbell several miles to a pasture, where he took Asbell out of the car (T.Tr. 120, 201). Asbell, who walked with a severe limp, hobbled to an abandoned barn in an attempt to escape; respondent followed Asbell to the barn, where he placed the .357 Magnum pistol to Asbell's ear and fired two high-velocity bullets through his brain, blowing off the top of Asbell's head (T.Tr. 45-46, 122, 201-202, 218, 349).

Respondent was apprehended in Savannah, Georgia, the next day (T.Tr. 90-92, 123, 155, 204, 218, 349). After giving police a false name and several false stories, he confessed to the murder of Roy Asbell (T.Tr. 107-109, 113-116, 122, 127, 180-184, 186-190, 192-193, 201, 205, 212, 224, 336). Roy Asbell's car was found outside a Savannah hotel where respondent had stayed and the .357 Magnum pistol found in respondent's possession was positively identified as that taken from the home of Charles Asbell (T.Tr. 62-63, 91-92, 109, 124, 126-127, 185-186, 205-206, 208-211, 216, 261, 265). Respondent's fingerprints were found in the stolen car abandoned at Charles Asbell's residence (T.Tr. 61, 84-85). Following his apprehension and before his present trial, respondent entered pleas of guilty to his 1973 murder and armed robbery as well as to kidnapping, two counts of armed robbery, two counts of burglary and theft committed after his escape (Ex. 4 at 8-12). Among the sentences imposed for these crimes were five terms of life imprisonment (Ex. 4 at 10-12).

After respondent's conviction for the murder of Roy Asbell, the trial jury was instructed as to four possible aggravating circumstances, any one of which would permit a sentence of death. See Ga.Code.Ann. § 27-2534.1(b). In its verdict imposing the death penalty, the jury specifically found the following aggravating circumstances:

1. That respondent committed the murder after escap-

ing from a place of lawful confinement, Ga.Code.Ann. § 27-2534.1(b)(9);

2. That respondent had a prior record of conviction for a capital felony, Ga.Code.Ann. § 27-2534.1(b)(1); and

3. That respondent had "a substantial history of serious assaultive criminal convictions," Ga.Code.Ann. § 27.2534.1(b)(1) (Ex. 1 at 12-13).

A year after respondent's conviction, the Supreme Court of Georgia held that the third of the above-quoted aggravating circumstances was unconstitutional because it was impermissibly vague. *Arnold* v. *State*, 236 Ga. 534, 224 S.E.2d 386, 391-392 (1976).

On respondent's direct appeal from his conviction and sentence, he asserted among other things that his sentence of death should be vacated because the third aggravating circumstance listed above had been held invalid. In affirming respondent's conviction, the Supreme Court of Georgia noted that "the evidence supports the jury's findings of the other statutory aggravating circumstances, and consequently the sentence is not impaired." *Stephens* v. *State*, 237 Ga. 259, 227 S.E.2d 261, 263 (1976), *cert. denied* 429 U.S. 986 (1977). Pursuant to its duty under Ga.CodeAnn. § 27-2537, the Georgia Supreme Court independently reviewed the evidence in this case and found the death sentence to be properly imposed. *Stephens* v. *State, supra*, 227 S.E.2d at 263-264. Following the affirmance of his conviction, respondent filed a state habeas corpus petition, which petition was denied and the denial affirmed. *Stephens* v. *Hopper*, 241 Ga. 596, 247 S.E.2d 92 (1978), *cert. denied* 439 U.S. 991 (1978). Thereafter, respondent filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, and the petition was denied by the District Court. *Stephens* v. *Zant*, No. 79-30-MAC (M.D. Ga., May 11, 1979) (unreported).

The ruling of the District Court was reversed and remanded by the United States Court of Appeals for the Fifth Circuit. *Stephens* v. *Zant*, 631 F.2d 397 (5th Cir. 1980), *opinion modified* 648 F.2d 446 (5th Cir. 1981). The present writ of certiorari followed.

SUMMARY OF ARGUMENT

It is the position of the *amici curiae* that the finding of an invalid aggravating circumstance by the jury or trial judge in its verdict imposing a sentence of death does not warrant the setting aside of the death sentence so long as (1) the sentencing authority finds at least one other aggravating circumstance which remains valid; and (2) no evidence is introduced at the sentencing hearing which would have been inadmissible had the invalid aggravating circumstance not been submitted.

The function of aggravating circumstances (using that term to refer to the statutory language of the circumstance itself rather than to the evidence introduced to sustain it) is to limit and channel the discretion of the sentencing authority by limiting the imposition of death to certain classes of murders; if one statutorily-defined class is found to be present, it is irrelevant whether or not other classes are present or whether all classifications found are valid. Once this threshold is crossed (and assuming that at least one statutory aggravating circumstance is found), the sentencing authority's decision as to what sentence should be imposed rests upon the evidence, not upon the statutory language. In the case at bar, the presence or absence of the invalid aggravating circumstance had no effect upon what evidence was admissible at the sentencing phase; this is equally true under most of the current state death penalty statutes. That being the case, as has been held by the majority of state courts which have considered this question, no basis exists for the reversal of a death sentence based

upon the invalidation of one of several statutory aggravating circumstances.

The arguments by the Fifth Circuit on this issue do not support its conclusion. This is not an instance where a general verdict is rendered and such verdict might rest upon an unconstitutional ground—to the contrary, the jury in the present case specifically found three statutory aggravating circumstances and only one valid circumstance was necessary to permit the lawful imposition of the death sentence. Nor can it legitimately be asserted that the sentence should be vacated because it might have caused the jury to unduly "focus" on some evidence; not only is this theory totally unsupported and speculative but it was beyond the scope of federal habeas corpus for the Fifth Circuit to independently review the present death sentence and vacate it based upon its own theories of error and prejudice rather than upon any constitutional defect in the proceeding.

In the past ten years, the views of this Court with regard to what is required for the constitutional imposition of capital punishment have changed with alarming frequency. This constant state of flux has resulted in the continuous voiding and reenactment of state legislation and the release of a stream of convicted murderers from the sentence manifestly justified by their crimes. Moreover, the decisions of this court have encouraged the implicit view in the lower courts that death sentences should be set aside by reason of technical legal niceties which have no reasonable relation to the validity of the sentencing process, and have further promoted excessive and deliberately dilatory litigation on the part of defendants and in particular the national organizations which seek to obstruct the imposition of all death penalties. The present state of affairs, in which the carrying out of any death sentence is a practical impossibility, is a mockery of the criminal justice system and cries out for action by this Court.

ARGUMENT

The sole issue in this cause is whether a sentence of death is rendered constitutionally invalid by the invalidity of a statutory aggravating circumstance found by the sentencing authority (the jury or the trial judge), even though the sentencing authority also found other statutory aggravating circumstances which are proper and supported by the evidence. It is the position of the *amici curiae* that the finding of an invalid aggravating circumstance does not cause a death sentence to violate the constitution so long as (1) the sentencing authority finds at least one other aggravating circumstance which is constitutionally valid and supported by the evidence; and (2) no evidence is introduced at the sentencing hearing which would have been inadmissible absent the submission of the invalid aggravating circumstance.

I. The Capital Sentencing Process

The argument of the *amici curiae* rests upon the nature of the process by which death sentences are imposed and upon the meaning of the term "aggravating circumstance." Under the laws of all 35 states which currently have the death penalty,[2] a verdict of guilt as to a capital offense results in a separate hearing on this issue of punishment in which further evidence may be introduced by the parties.

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[2]Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and Wyoming. See Gillers, "Deciding Who Dies," 129 U.Pa.L.Rev. 1, 101-119 (1980); and footnote 3, *infra*. State statutes which have been declared unconstitutional by the highest state court or which are manifestly unconstitutional under this Court's past decisions are excluded from this list. See, e.g., *District Attorney* v. *Watson*, 411 N.E.2d 1274 (Mass. 1980).

With regard to what evidence may be introduced by the prosecution at this punishment-phase hearing, the laws of the vast majority of states provide that such evidence is not limited to that required to establish the aggravating circumstance or circumstances submitted in the case, but may also include (varying with the language of each statute) the nature and circumstances of the offense, the character and background of the defendant, the prior convictions of the defendant, and any other matters relevant to sentencing.[3] This provision is both reasonable and consistent with the decisions of this Court; as noted in *Gregg* v. *Georgia*, 428 U.S. 153 (1976),

> "We have long recognized that '[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities

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[3]Ala.Code. tit. 13A, § 5-45(c) (1981 Supp.); Cal. Penal Code § 190.3 (1978 Supp.); Del.Code, tit. 11, § 4209(c) (1979); Fla. Stat. Ann. § 921.141(1) (1979 Supp.); Ga.Code.Ann. § 27-2503(a) (1977); Idaho Code § 19-2515(e) (1977 Supp.); Ky.Rev.Stat. § 532.025.1(a) (1976 Supp.); La.Code.Crim.Pro.Ann., art. 905.2 (1976 Supp.); Md. Ann.Code. art. 27 § 413(c) (1979 Supp.); Miss.Code.Ann., § 99-19-101(1) (1977); Mo.Rev. Stat. § 565.006.2 (1978); Mont.Rev.Code.Ann. § 46-18-302 (1977 Supp.); Neb.Rev.State. § 29-2521 (1979 Supp); Nev.Rev.Stat. § 175.552 (1979); N.H.Rev.Stat., § 630.5(II) (1977 Supp.); N.M.Stat.Ann., § 21-20A-1(C) (1979 Supp.); N.C.Gen.Stat. § 15A-2000(a)(3) (1978); Ohio.Rev.Code.Ann., § 2929.03(D)(1) (effective 10-19-81); Or.Rev.Stat. § 163.116(1) (1979); 42 Pa.Cons.Stat. Ann., § 9711(a)(2) (1981 Supp.); S.C.Code § 16-3-20(B) (1978 Supp.), as construed by *State* v. *Shaw*, 273 S.C. 194, 255 S.E.2d 799, 805-806 (1979), *cert. denied* 444 U.S. 957 (1979); S.D. Codified Laws Ann., § 23A-27A-2 (1979), Tenn.Code.Ann., § 39-2404(c) (1981 Supp.); Tex.Code.Crim.Proc.Ann., Art. 37.071(a) (1981 Supp.); Utah.Code. Ann. § 76-3-207(1) (1978); Va.Code.Ann. § 19.2-264.4(B) (1980 Supp.); Wyo.Stat. § 6-4-102(c) (1977). *Contra*: Ariz.Rev.Stat.Ann. § 13-703(C) (1979 Supp.); Ark.Crim.Code. § 41-1301(4) (1977); Colo.Rev.Stat. § 16-11-103(2) (1979 Supp.); Conn.Gen.Stat.Ann., § 53a-46a(c) (1980 Supp.); Ill.Ann. Stat., ch. 38, § 9-1(e) (1973); Ind.Code.Ann. § 35-50-2-9(d) (1973); Okla.Sta.Ann., tit. 21, § 701.10 (1976 Supp.); Wash.Rev.Code.Ann. § 10.94.020(4) (1977).

> of the offender'. . . . Otherwise, "the system cannot function in a consistent and a rational manner'" (citations and footnote omitted). *Id.*, 428 U.S. at 189.

See also *Id.*, 428 U.S. at 203-204. The necessity of individualized sentencing based upon a broad range of evidence receives even greater emphasis in *Woodson* v. *North Carolina*, 428 U.S. 280, 303-305, (1976); and *Lockett* v. *Ohio*, 438 U.S. 586, 602-606 (1978).

On the basis of the evidence before it, the sentencing authority must take at least two actions in rendering a verdict as to punishment. First, it must make a specific written finding that at least one statutory aggravating circumstance is established by the evidence, thus creating the possibility that a death sentence may be imposed.[4] Second, given that the death penalty *may* be imposed, the sentencing authority must decide whether or not this sentence *should* be imposed and thereby render a verdict of death or of a lesser punishment; many statutes characterize this process as determining whether "the aggravating circumstances outweigh the mitigating circumstances." Cal.Penal Code § 190.3 (1978 Supp.). See also Ala.Code, tit. 13A, § 5-47(e) (1981 Supp.); Ind.Code.Ann. § 35-50-2-9(e) (1973); Mo.Rev.Stat. § 565.012.1 (1978); 42 Pa.Cons.Stat. Ann. § 9711(e)(1) (1981 Supp.).

From the above facts, it is apparent that the term "aggravating circumstance," as used in most state statutes,

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[4]Some states impose additional requirements, such as that the sentencing authority specify any mitigating circumstances it found, e.g., Md.Ann.Code., act. 27 § 413(j) (1979 Supp.); or that a finding be made of the defendant's future dangerousness, e.g., Tex.Code.Crim.Proc.Ann., Art. 37.071(b) (1973). The above generalizations as to the sentencing process do not apply to Texas and the two other states which employ the Texas system of capital sentencing. Ore.Rev.Stat. § 163.116 (1979); Va.Code.Ann. § 19.2-264.4 (1980 Supp.). See *Jurek* v. *Texas*, 428 U.S. 262, 269-274 (1976) for an explanation of that system.

has two entirely different meanings according to the context in which it is used. The first (and arguably more accuate) meaning of "aggravating circumstance" is the *legal conclusion* the sentencing authority must derive from the evidence in order to even consider the possibility of a death penalty. For example, if the prosecution seeks the death penalty on the theory that the murder was committed after the defendant had escaped from a lawful place of confinement, Ga.Code.Ann., § 27-2534.1(b)(9), the jury or trial judge must first review the evidence and determine whether this statutory element is present—if the sentencer does not make the necessary legal conclusion that this or some other statutory agravating circumstance is present, the defendant is entitled to a sentence of imprisonment as a matter or law. The second meaning often given the term "aggravating circumstance," particularly apparent in the statement that the aggravating and mitigating circumstances are "weighed" to determine punishment, is the *evidence in aggravation* which is before the sentencing authority. The jury or trial judge does not weigh the statutory language of the aggravating and mitigating circumstances, it weighs the evidence which aggravates or mitigates the murder committed.[5] Any contrary interpretation of "aggravating circumstance" in this context, requiring the sentencing authority to consider only the statutory language instead of the facts, would be irrational, unenforceable (since a jury will inevitably and properly consider the evidence before it) and directly contrary to the requirement that the sentencing process take into account the individual facts relating to each crime and de-

[5]The ambiguity in the term "aggravating circumstance" as used in the laws of many states is avoided in the statutes of the State of Delaware; Del.Code. tit. 11, § 4209(d)(1) (1979) provides that the jury or judge must first find at least one "statutory aggravating circumstances," and then may weigh "all relevant evidence in aggravation or mitigation" in determining whether the death penalty is appropriate.

fendant. *Lockett* v. *Ohio, supra,* 438 U.S. at 602-606; *Gregg* v. *Georgia, supra,* 428 U.S. at 197-198.

These principles clearly indicate the answer to the issue at bar. The sole significance of statutory aggravating circumstances is to determine, at the threshold of the sentencing deliberation, whether the death penalty *may* be imposed; the sentencing authority must review the evidence before it and conclude whether any of the statutory categories submitted to it is present. As pointed out in *Gregg* v. *Georgia, supra,* 428 U.S. at 188-198, this requirement serves to "limit" and "channel" the discretion of the jury in making the sentencing decision. Once this determination is made (and assuming that an aggravating circumstance its found), the issue is whether the death penalty *should* be imposed, and the language of the statutory aggravating circumstances have nothing to do with this question—rather, this decision is made by the sentencing authority based upon the evidence before it. Since statutory aggravating circumstances operate only to open the door to consideration of the death penalty, and since any one such circumstance will perform this function regardless of the presence or absence of others, the invalidity of an aggravating circumstance found by the sentencing authority would impermissibly taint the sentence of death in only two circumstances: (1) if the invalid aggravating circumstance was the only aggravating circumstance found (thus entitling the defendant to a lesser sentence as a matter of law); or (2) if the invalid circumstance somehow resulted in the introduction of evidence at the punishment phase which would not otherwise have been admissible.

This reasoning is inherent in the decisions of Georgia and several other states which have considered the present issue. The Georgia courts have repeatedly held that a death sentence based upon multiple aggravating circumstances

will stand even if some of the circumstances are set aside. As stated in *Burger* v. *State*, 245 Ga. 458, 265 S.E.2d 796 (1980), *cert. denied* 446 U.S. 988 (1980),

> "Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance, or in this case two, does not taint the proceedings so as to invalidate the other aggravating circumstance found and the sentence of death based thereon" (citations omitted). *Id.*, 265 S.E.2d at 800.

See also *Stevens* v. *State*, 247 Ga. 698, 278 S.E.2d 398, 407-408 (1981), *cert. denied* 449 U.S 891 (1981); *Green* v. *State*, 246 Ga. 598, 272 S.E.2d 475, 485 (1980), *cert. denied*, ____ U.S. ____, 101 S.Ct. 1402, 68 L.Ed.2d 320 (1981); *Gates* v. *State*, 244 Ga. 587, 261 S.E.2d 349, 358 (1979), *cert. denied* 445 U.S. 938 (1980). In so holding, the Georgia Supreme Court noted that the invalidity of the aggravating circumstances had no impact upon the evidence admitted at the punishment phase. *Burger* v. *State*, *supra*, 265 S.E.2d at 800; *Collier* v. *State*, 244 Ga. 553, 261 S.E.2d 364, 378 (1979), *cert. denied* 445 U.S. 946 (1980); *Stephens* v. *Hopper*, *supra*, 247 S.E.2d at 97. Other states have held to the same effect.[6] Thus, the Fifth Circuit decision in the case at bar is directly contrary to the long-standing law of the

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[6]*State* v. *Taylor*, No. 108 (N.C., November 3, 1981); *State* v. *Monroe*, 397 So.2d 1258, 1274-1276 (La. 1981); *Brown* v. *State*, 381 So.2d 690, 696 (Fla. 1980), *Cert. Denied* 449 U.S. 1118 (1981); *State* v. *Clark* 126 Ariz., 428, 616 P.2d 888, 895-897 (banc 1980), *cert. denied* 449 U.S. 1067 (1980); *State* v. *Rust*, 197 Neb. 528, 250 N.W.2d 867, 872-876 (1977), *cert. denied* 434 U.S. 912 (1977); *State* v. *Mercer*, 618 S.W.2d 1, 10 (n.5) (Mo. banc 1981), *cert. denied* ____ U.S. ____, 50 U.S.L.W. 3279 (October 13, 1981). *Contra*: *State* v. *Moore*, 614 S.W.2d 348, 351-352 (Tenn. 1981); *Hopkinson* v. *State*, 632 P.2d 79, 171-172 (Wyo. 1981); *Bufford* v. *State*, 382 So.2d 1162, 1174 (Ala.Cr.App., 1980); *Cf. Williams* v. *State*, No. CR80-217 (Ark., October 5, 1981), wherein the invalid aggravating circumstance caused the admission of otherwise inadmissible evidence.

State of Georgia and the majority of other states which have considered the present issue.[7]

II. The Rationale of the Fifth Circuit

In its opinions reversing the decision of the District Court and vacating respondent's death sentence, the Fifth Circuit offered two theories as to why a sentence of death must fall if any one of several aggravating circumstances found is deemed to be invalid. The first such theory is by analogy to the holdings of this Court in *Stromberg* v. *California*, 283 U.S. 359 (1931); *Yates* v. *United States*, 354 U.S. 298 (1957); *Street* v. *New York*, 394 U.S. 576 (1969); and *Bachellar* v. *Maryland*, 397 U.S. 564 (1970). *Stephens* v. *Zant*, *supra*, 631 F.2d at 406. In these decisions (all relating to the statutory abridgement of First Amendment rights), this Court held that where a jury returns a general verdict of guilt in a criminal prosecution, and where one of several statutory bases for the conviction is unconstitutional, the conviction must be reversed because it cannot be determined whether or not the verdict rested upon the unconstitutional ground. See *Stromberg* v. *California*, *supra*, 283 U.S. at 267-268; *Bachellar* v. *Maryland*, *supra*, 397 U.S. at 570-571. By analogy, the Court of Appeals argues, it cannot be established "that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance." *Stephens* v. *Zant*, *supra*, 631 F.2d at 406.

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[7]Curiously, the Fifth Circuit has recently rendered a decision which appears to directly conflict with its decision in the present case and support the states' majority position. In Williams v. Blackburn, 649 F.2d 1019 (5th Cir. 1981), a habeas corpus appeal in a Louisiana death penalty case, the Court of Appeals adopted District Court language which acknowledges that, where several aggravating circumstances are found, the appellate court need only conclude that one aggravating circumstance is valid to uphold the death sentence. *Id.* at 1025; see *State* v. *Williams*, 383 So.2d 369, 374 (La. 1980), *cert. denied* 449 U.S. 1103 (1981).

Had the jury in the present case returned a punishment verdict which merely imposed the death sentence without specifying what statutory aggravating circumstances it found to permit such a sentence (and had this hypothetical verdict been permissible under Georgia law), the Fifth Circuit's argument might have more force. But the jury in this case *did not* return a general verdict—to the contrary, it specified in writing three separate aggravating circumstances which it found to authorize the death penalty. It is utterly undisputed that two of these circumstances are valid and supported by the evidence. As discussed in Part I, *supra*, the constitutional defect in the third aggravating circumstance does not in any manner change the fact that two valid circumstances were found, nor does it alter in the slightest the evidence which was properly before the jury in the punishment phase. Although the application of the principle enunciated in *Stromberg* to the invalidity of one of several aggravating circumstances in a capital case has not previously been accepted for adjudication by this court, it has received the attention of at least one Justice; in the denial of certiorari in *Drake* v. *Zant*, 449 U.S. 999 (1980), Justice White, dissenting from the denial of certiorari, stated that

> "The imposition of a death sentence, despite a failure to sustain all of the aggravating circumstances found by the jury, does not conflict with either *Stromberg* v. *California*, [*supra*], *or Street* v. *New York*, [*supra*]. The Georgia Supreme Court has held that under Georgia law it has the power to determine whether or not a death sentence should be imposed under these circumstances. As I see it, this does not violate the United States Constitution." *Drake* v. *Zant*, *supra*, 449 U.S. at 1003 (White, J., dissenting).

For the reasons enunciated above, the *amici* concur in this conclusion.

As stated in its original opinion, the Fifth Circuit's second theory in support of its ruling was that "[t]he presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of petitioner which otherwise would not have been before it." *Stephens* v. *Zant*, *supra*, 631 F.2d at 406. The difficulty with this argument is that it is a flatly erroneous statement of Georgia law; Ga.Code.Ann. § 27-2503(a) provides that

> "In [the punishment-phase] hearing, the [jury] shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, *including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant*, or the absence of any prior conviction and pleas" (emphasis supplied).

See also *Stephens* v. *Hopper*, *supra*, 247 S.E.2d at 97. When confronted with this fact in the motion for rehearing, the court nimbly shifted its rationale to argue (without any citation of authority) that the presence of the invalid aggravating circumstance "may have unduly directed the jury's attention to [respondent's] prior convictions." *Stephens* v. *Zant*, *supra*, 648 F.2d at 446.

This is an astounding mode of analysis. This Court's decisions since *Furman* v. *Georgia*, 408 U.S. 238 (1972) have been directed to such matters as limiting and directing the jury's discretion in capital sentencing[8] and assuring that the jury has before it all evidence relevant to this issue[9]—in short, to creating conditions which would permit the jury to make an informed, rational and consistent decision as to whether a death sentence should be imposed. It is utterly undisputed that all of the procedural requisites stated in this Court's decisions were met in the pres-

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[8]Eg., *Gregg* v. *Georgia*, *supra*, 428 U.S. at 188-207, 220-226.
[9]*Lockett* v. *Ohio*, *supra*, 438 U.S. at 602-606.

ent case: the jury's discretion was properly limited by the Georgia statutory scheme, the defendant was not restricted in his presentation of mitigating factors and (as the Court of Appeals belatedly admitted) no inadmissible or irrelevant evidence was before the jury in the sentencing proceeding. Rather, the Fifth Circuit now essays what this Court has wisely never presumed to attempt: to retrospectively enter the jury room and speculate whether or not the jury's deliberations were correctly concluded. How is it to be determined what might cause a particular jury to "unduly" direct its attention to a particular item of evidence? If it is to be assumed that the presence of an invalid aggravating circumstance might produce such a result, how can the possibility be precluded that other factors—the argument of counsel, the demeanor of a witness, the order of proof—might result in an "undue focus" upon certain evidence? The argument of the Fifth Circuit sinks of its own weight into this morass of speculation.

Even assuming that some reliable guess might be made regarding the nature of the jury's deliberations, the fact remains that this issue was far beyond the scope of any legitimate review in an appeal from the denial of a federal habeas corpus petition. Under 28 U.S.C. § 2254, habeas corpus relief is available "*only* on the ground that [the habeas corpus petitioner] is in custody in violation of the Constitution or laws and treaties of the United States" (emphasis supplied); it is not a substitute for an appeal and does not permit a review of state trial issues which do not impinge upon federal constitutional rights. See *Wainwright* v. *Sykes*, 433 U.S. 72, 81 (1977). As noted above, the sentencing of respondent was totally in compliance with the procedural requirements stated in the decisions in this Court. That being the case, the Fifth Circuit had no roving commission to independently review the jury's verdict as to punishment and to speculate as to

possible sources of prejudice in that verdict—this was the duty of the Georgia Supreme Court under Ga.Code.Ann. § 27-2537(b), and that court properly performed its function and upheld the sentence of death. *Stephens* v. *State*, *supra*, 237 S.E.2d at 263-264.

The ultimate points to be made about this case are two. First, the invalidity of the third statutory aggravating circumstance had no possible impact upon whether the death penalty *could* be imposed in this case because there remained two valid aggravating circumstances found by the jury, either one of which would independently have permitted the consideration of capital punishment as an alternative. Second, the invalidity of the third statutory aggravating circumstance had no possible impact upon whether the death penalty *should* be imposed in this case because it had *no effect whatsoever* upon the evidence which was before the jury. Under these circumstances, it may not reasonably be argued that the presence of this invalid aggravating circumstance violated respondent's constitutional rights. The Fourteenth Amendment guarantee of due process is, in essence, a guarantee of fundamental fairness. See *Ingraham* v. *Wright*, 430 U.S. 651, 675 (1977); *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642-643 (1974). Fundamental fairness—the integrity of the capital sentencing process—is in no way impaired in this case.

III. In Search of Reasonableness in Death Penalty Review

Ten years ago, this Court decided the case of *McGautha* v. *California*, 402 U.S. 350 (1971), in which it rejected the claim that a bifurcated trial and the submission of specific aggravating or mitigating circumstances to the jury were requirements under the United States Constitution. Speaking for a majority of the Court (the last time for nine years that this would occur in a death penalty case), Justice Harlan stated that

> "the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of the students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court" (citation omitted). *Id.*, 402 U.S. at 221.

Thirteen months after *McGautha*, this Court radically changed its view in *Furman* v. *Georgia*, *supra*, a decision which resulted in confusion among courts, legislatures and learned authorities as to what was required to impose the death penalty in conformance with the Constitution.[10] Four years later, at an untold cost in legislative and judicial resources, this confusion was to some degree rectified by *Gregg* v. *Georgia*, *supra*, and its accompanying cases. Since *Gregg*, however, this Court has continued to periodically modify its view as to what is constitutionally required to impose the death sentence, steadily placing new areas and issues of capital sentencing procedure under the aegis of constitutional "due process", voiding new state statutes and releasing more condemned criminals from their sentence in the process. *Coker* v. *Georgia*, 433 U.S. 584 (1977); *Lockett* v. *Ohio*, *supra*; *Green* v. *Georgia*, 442 U.S. 95 (1979); *Godfrey* v. *Georgia*, 446 U.S. 420 (1980); *Beck* v. *Alabama*, 447 U.S. 625 (1980); *Estelle* v. *Smith*, ____ U.S. ____, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *Bullington* v. *Missouri*, ____ U.S. ____, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). By "constantly tinkering with the principles laid down in the five death penalty cases decided in 1976,"[11] this Court has led at least one United States Court of

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[10] *Lockett* v. *Ohio*, *supra*, 438 U.S. at 599. See *Beck* v. *State*, 396 S.2d 645, 656-657 (Ala. 1980).

[11] *Coleman* v. *Balkcom*, ____ U.S. ____, ____ S.Ct. ____, 68 L.Ed.2d 334, 339 (1981) (Rehnquist, J., dissenting from the denial of certiorari).

Appeals judge to suspect that "the Court is in process of hedging this penalty about with such obstacles that, as a practical matter, it cannot be carried out." *Gibson* v. *Jackson*, 578 F.2d 1045, 1051 (5th Cir. 1978) (Gee, Circuit Judge, specially concurring).

Whether or not such is the case, this Court's decisions from and after 1976 have collectively operated upon the state and federal court system to greatly assist in ensuring that sentences of death will not be carried out. In its capacity as the highest explicator of constitutional law (and as the supreme authority to which courts and counsel must look in formulating analyses and approaches to novel issues in this field of law), this Court has sent two signals to the lower courts and defendants in death penalty litigation. First, by its opinions and its recent history of dealings in this field, it has inadvertently promoted the implicit attitude, particularly in the federal judiciary, that death sentences may and should be invalidated upon any colorable theory which creates unease in the judicial mind, regardless of whether there exists any reasonable assertion that the defendant's constitutional rights were violated or that the defendant suffered any prejudice thereby. It might be said, without intending disrespect to the lower courts involved, that this Court's decisions have reinforced and given legal substance to some judges' personal views on the death penalty, both those who privately oppose it and those who find it difficult or impossible to take the responsibility of upholding such a sentence in any case before them, no matter how constitutional or how justified. This concern has been expressed by Justice Rehnquist:

> "Perhaps out of a desire to avoid even the possibility of a 'Bloody Assizes,' this Court and the lower federal courts have converted the constitutional limits upon imposition of the death penalty by the States and the Federal Government into arcane niceties which parallel

> the equity court practices described in Charles Dickens' 'Bleak House,' Even though we have upheld the constitutionality of capital punishment statutes, I fear that by our recent actions we have mistakenly sent a signal to the lower state and federal courts that the actual imposition of the death sentence is to be avoided at all costs." *Coleman* v. *Balkcom, supra,* 68 L.Ed.2d at 339.

As discussed in Part II of this brief, *supra,* the present case is a classic instance of an unjustified and hypertechnical reversal of a death sentence by a lower court. See also *Jurek* v. *Estelle,* 623 F.2d 929, 956-985 (5th Ci. 1980), *cert. denied,* ___ U.S. ___, 101 S.Ct. 1724, ___ L.Ed.2d ___ (1981) (Brown, Circuit Judge, concurring and dissenting; and Reavley, Circuit Judge, dissenting); and the dissent of Justice Rehnquist from the denial of certiorari, *supra,* 101 S.Ct. at 1724-1728.

The second signal implicitly sent by this court from its recent course of decisions is to the convicted murderers on death row and to their counsel: the defendants are unmistakably encouraged to litigate, relitigate and then litigate again all conceivable theories relating to their convictions and sentences, in all courts possible and for as long as possible.[12] A condemned murderer has ample reason to believe, from past history, that if he delays his execution for two, five or ten years, this Court may eventually come up with a new doctrine which will retroactively vacate his sentence. Even if this does not come to pass, the defendant has grounds to hope (in part for the reasons discussed above) that the eighth or tenth court to review his case—often a federal appellate court on habeas corpus review—will rule in his

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[12]It is doubtful that the numerous organizations whose express design is to prevent the carrying out of any death sentence by perpetually litigating each and every such sentence truly require the benefit of such encouragement. See "The Mistress of Delay," NEWSWEEK, November 16, 1981, at pp. 102-103.

favor. "Given so many bites at the apple, the odds favor petitioner finding some court willing to vacate his death sentence because in its view his trial or sentence was not free from constitutional error" (citation omitted). *Coleman* v. *Balkcom, supra,* 68 L.Ed.2d at 338. Both the case at bar and *Jurek* v. *Estelle,* supra, demonstrate the success of such tactics.

The present state of affairs cannot be described as anything other than a mockery of the criminal justice system. In the nine years since *Furman,* a total of four executions have taken place in the United States—only one involving a defendant who resisted the carrying out of sentence. Meanwhile, despite the periodic batches of condemned criminals whose death sentences have been vacated by the various recent decisions of this court, the national population of inmates awaiting execution is growing to increasingly less manageable proportions. The *amici* respectfully submit that the time is long past for this Court to signal an end to this unjust and systematic frustration of what this Court has repeatedly held to be a lawful and constitutional power of a civilized society. An indication by this Court, at the very least, that the Fifth Circuit was incorrect in vacating the sentence of death at bar would be a step toward this goal.

CONCLUSION

In view of the foregoing, the *amici curiae* respectfully submit that the judgment of the United States Court of Appeals should be reversed insofar as it vacated the sentence of respondent and remanded the cause for further proceedings.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

JOHN M. MORRIS III
Assistant Attorney General

P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys of Record

APPENDIX: LIST OF THE AMICI CURIAE

State of Alabama
Charles A. Graddick
Attorney General of Alabama
State Administration Building
Montgomery, Alabama 36130

State of California
George Deukemjian
Attorney General of California
800 Tishman Building, 3580 Wilshire
Los Angeles, California 90010

State of Florida
Jim Smith
Attorney General of Florida
State Capitol
Tallahassee, Florida 32304

State of Louisiana
William J. Guste, Jr.
Attorney General of Louisiana
2-3-4 Loyola Avenue
New Orleans, Louisiana 70112

State of Missouri
John D. Ashcroft
Attorney General of Missouri
P. O. Box 899
Jefferson City, Missouri 65102

State of North Carolina
Rufus L. Edmisten
Attorney General of North Carolina
Department of Justice
Raleigh, North Carolina 27602

State of South Carolina
Daniel R. McLeod
Attorney General of South Carolina
Wade Hampton Office Building
Columbia, South Carolina 29211

State of Utah
David L. Wilkinson
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114

ADDENDUM TO APPENDIX

The following states should be added to the list of the *amici curiae* contained in the Appendix to the printed brief.

State of Mississippi

William A. Allain
Attorney General of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

State of Montana

Michael T. Greely
Attorney General of Montana
State Capitol
Helena, Montana 59601

State of Nebraska

Paul L. Douglas
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska 68509

State of Nevada

Richard H. Bryan
Attorney General of Nevada
Heroes Memorial Buidling
Carson City, Nevada 89710

State of New Mexico

Jeff Bingaman
Attorney General of New Mexico
P. O. Box 1508
Santa Fe, New Mexico 87501

81-80

No. ____

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In the

Supreme Court of the United States

_____ TERM, 1981

WALTER ZANT, WARDEN,

Petitioner,

VERSUS

ALPHA OTIS O'DANIEL STEPHENS,

Respondent.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE BY THE ATTORNEY GENERAL OF LOUISIANA IN SUPPORT OF THE STATE OF GEORGIA'S PETITION FOR WRIT OF CERTIORARI

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

BARBARA RUTLEDGE
Assistant Attorney General
State of Louisiana

WALTER L. SMITH, JR.
Assistant Attorney General
State of Louisiana

PATRICK G. QUINLAN
Assistant Attorney General
State of Louisiana
1885 Wooddale Boulevard
Suite 1010
Baton Rouge, Louisiana 70806

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QUESTION PRESENTED

When a death penalty is imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, is the death penalty to be vacated simply because one of the aggravating circumstances is eventually set aside?

AMICUS CURIAE INTEREST

The issue presented is of profound significance to the citizens and courts of Louisiana since Louisiana has a

capital sentencing procedure modeled after that currently employed in the State of Georgia, and, because Louisiana Courts have recently resolved a substantially identical issue contrary to the Fifth Circuit's holding in *Stephens v. Zant*, 631 F.2d 397 (5 Cir. 1980).

STATEMENT OF THE CASE

Respondent Alpha Otis O'Daniel Stephens was tried January 20-21, 1975, in the Superior Court of Bleckley County, Georgia. The jury found the defendant guilty of murder. At the sentencing phase of the trial, the jury found the existence, beyond a reasonable doubt, of three statutorily provided aggravating circumstances. The jury then recommended the death penalty.

While respondent's appeal was pending, the Georgia Supreme Court held one of the three aggravating circumstances to be invalid. See *Arnold v. State*, 236 Ga. 534 (1976). Nevertheless, the Georgia Supreme Court upheld respondent's death penalty because the evidence supported the jury's findings of the other two aggravating circumstances. *Stephens v. State*, 237 Ga. 259 (1976), *Cert. denied* 429 U.S. 986 (1977).

On habeas review, the Georgia Supreme Court again held that the fact that the jury was allowed to consider an aggravating circumstance later held to be unconstitutional, did not require the vacating of the death penalty. *Stephens v. Hopper*, 241 Ga. 596 (1978), *Cert. denied* 439 U.S. 991 (1978).

On habeas application to the Fifth Circuit Court of Appeal, the accused's death penalty was vacated. *Stephens v. Zant*, 631 F.2d 397 (5 Cir. 1980).

Upon the Fifth Circuit Court of Appeal's decision in

Stephens v. Zant, supra, the Attorney General of the State of Georgia invited the State of Louisiana to participate in a petition of Certiorari to this Honorable Court.

Following review of the disputed matter, it was determined that the Attorney General of the State of Louisiana would, in accord with Rules 33, 34 and 36 of the Supreme Court Rules of the United States, participate and file an amicus curiae brief.

ARGUMENT SUPPORTING GRANTING OF THE WRIT

The State of Georgia petitions this Honorable Court for a Writ of Certiorari to review the Fifth Circuit's holding in *Stephens v. Zant*, supra. The Honorable Attorney General of Georgia asserts that "Where a death penalty is imposed on the basis on (of) a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, the death penalty should not be set aside because one of these aggravating circumstances is set aside."

The Louisiana Attorney General concurs with the opinion of the Georgia Attorney General and wishes to express its views to this Honorable Court.

It is the Louisiana Attorney General's opinion that the holding of *Stephens v. Zant*, supra, is in direct conflict with Louisiana statutory provisions, as well as the majority view recently expressed by the Louisiana Supreme Court in *State v. Sonnier*, ___ So.2d ___ (La. 1981), (#81-K-1846). See La. C.Cr.P. section 905.3.

The Louisiana procedure established for the constitutional imposition of the death penalty is similar to that

provided by the State of Georgia. See La. C.Cr.P. 905 et seq. and Georgia Code Annotated section 27-2534.1.

The Louisiana Supreme Court has stated and frequently reiterated that Louisiana's capital punishment scheme is modeled on the Georgia procedure which was approved in *Gregg v. Georgia*, 96 S.Ct. 2909 (1976). Our statute, as Georgia's, provides for a bifurcated determination of an accused's guilt and punishment. At the sentencing hearing, the Georgia and Louisiana legislation both provide that the jury must consider whether certain specified aggravating circumstances exist and whether any mitigating circumstances are present. Only one aggravating circumstance need be found under the Georgia and Louisiana legislation to support a sentence of death. Further, other similarities exist between the Georgia and Louisiana legislative schemes: the jury must specify the aggravating circumstances found; the State Supreme Court must consider as part of its mandatory review whether the sentence was influenced by passion, prejudice, or any other arbitrary factor, whether the evidence supports the finding of statutory aggravating circumstance, and whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. See *State of Louisiana v. David Martin*, 376 So.2d 300 (La. 1979) and *State v. Williams*, 383 So.2d 369 (La. 1980).

The Louisiana Supreme Court has consistently interpreted Louisiana legislation to require the finding of *one* aggravating circumstance to justify the imposition of the death penalty. Article 905.3 of the Louisiana Code of Criminal Procedure pertinently provides:

> "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that *at least one statutory aggravating circumstance exists* and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances." (Emphasis added).

Since *State v. Martin*, supra, through the recent case of *State v. Elmo Patrick Sonnier*, supra, the Louisiana Supreme Court has indicated that only one statutorily provided aggravating circumstance need be proven beyond a reasonable doubt. See also *State v. Williams*, supra, and *State v. Colin Clark*, 387 So.2d 1124 (1980).

It is the Louisiana Attorney General's reasoned and professional belief that the Fifth Circuit Court of Appeal's ruling in *Stephens v. Zant*, supra, is in substantial conflict with current Louisiana jurisprudence.

In *State v. Elmo Patrick Sonnier*, supra, the defendant was convicted of first degree murder and sentenced to death following a penalty hearing.

The evidence presented by the State at the penalty trial established that the defendant and his brother kidnapped a young man and young woman, robbed them, burglarized their automobile, and raped the woman. Afterward, at the defendant's instigation, the two young persons were killed.

The jury found that the evidence established five aggravating circumstances. The jury found that the offender was engaged in the perpetration of an aggravated kidnapping, an aggravated burglary and an armed rob-

bery. The Court found that the evidence supported those findings. The jury also found that the defendant knowingly created a risk of death or great bodily harm to more than one person. Because the defendant killed both victims in a single and consecutive course of conduct, the evidence also supported that finding.

The jury's finding that the murder was committed in an especially heinous, atrocious or cruel manner was questioned by the Court in light of this Court's opinion in *Godfrey v. Georgia*, 100 S.Ct. 1759 (1980). The Court stated:

> "In the present case the jury's findings that the homicides were committed in an especially heinous, atrocious or cruel manner were of questionable constitutional validity. The jury was not instructed on the proper narrow construction of the statute." (at p. 16 of slip opinion).

Although the Court concluded that the evidence did not adequately support the jury's finding regarding one of the aggravating circumstances, it nevertheless affirmed the death sentence. The Court said:

> "The failure of one aggravating circumstance in this case does not so taint the proceedings as to invalidate the other aggravating circumstances found or the sentence of death." (at p. 16 of slip opinion).

CONCLUSION

Since the Fifth Circuit's resolution of the issue presented in *Stephens v. Zant* seems to be in substantial conflict with *State v. Sonnier*, supra, and Louisiana Code of Criminal Procedure section 905.3, the Louisiana Attorney General respectfully urges this Honorable Court

to grant the State of Georgia's timely petition for Writ of Certiorari.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
Attorney General

BARBARA RUTLEDGE
Assistant Attorney General

WALTER L. SMITH, JR.
Assistant Attorney General

PATRICK G. QUINLAN
Assistant Attorney General
Counsel of Record
1885 Wooddale Boulevard
Suite 1010
Baton Rouge, Louisiana 70806
Telephone: 504/925-4165

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No. 81-89

In The

Supreme Court of the United States

October Term, 1980

WALTER ZANT, WARDEN,
Petitioner,

vs.

ALPHA OTIS O'DANIEL STEPHENS,
Respondent.

On Petition for Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

BRIEF AMICUS CURIAE OF THE STATE OF MONTANA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MICHAEL T. GREELY
Attorney General of Montana
Counsel of Record

JOHN H. MAYNARD
Assistant Attorney General

Capitol Station
Helena, Montana 59620
(406) 449-2026

Attorneys for the State of Montana

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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BRIEF AMICUS CURIAE OF THE STATE OF MONTANA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The State of Montana, by and through its Attorney General, Michael T. Greely, appears on behalf of its citizens and files this brief pursuant to Rule 36 of the Rules of this Court.

INTEREST OF THE STATE OF MONTANA IN THE RESOLUTION OF THE SUBSTANTIAL FEDERAL QUESTION PRESENTED

Montana law provides for imposition of the death penalty when a person is convicted of the offense of

deliberate homicide or aggravated kidnapping if the sentencing authority finds "one or more" of seven statutorily enumerated aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency. Sections 46-18-301 through 46-18-310, MCA. Three persons are under sentence of death in Montana at the present time and in each case the constitutionality of one or more aggravating circumstances has been challenged before the Montana Supreme Court. Resolution of the question presented in this case will have a substantial impact on Montana law because Montana law is sufficiently similar to Georgia's that the question presented in the petition can arise in Montana.

ARGUMENT

This Court should resolve the direct conflict presented in this case between the Georgia Supreme Court and the Fifth Circuit Court of Appeals. Resolution of the substantial federal question presented here will reach far beyond the boundaries of the State of Georgia or the Fifth Circuit because of the number of states, including Montana, that have, to a greater or lesser extent, patterned their laws relative to imposition of the death penalty on Georgia law following this Court's decision in *Gregg v. Georgia*, 428 U. S. 153 (1976).

Furthermore, this Court's decision in *Godfrey v. Georgia*, 446 U. S. 420 (1980), in which a statutory aggravating circumstance previously approved in *Gregg*, supra, was found to have been applied unconstitutionally, has resulted in renewed attacks on Montana's aggravating

circumstances. If one of these claims is found to have merit under *Godfrey,* supra, Montana will be faced with the exact question presented in the petition along with the conflicting decisions of the Fifth Circuit and the various state courts that have considered it. Additional litigation, in an area of the law already overburdened with protracted litigation, can be avoided by the prompt consideration and resolution of the issue presented in this petition.

CONCLUSION

Montana supports the Petition for Writ of Certiorari of petitioner in this cause and for the reasons expressed above, Montana urges the Court to grant certiorari and review the opinion and judgment of the court below.

Respectfully submitted,

MICHAEL T. GREELY
Attorney General of Montana

JOHN H. MAYNARD
Assistant Attorney General

Capitol Station
Helena, Montana 59620

Attorneys for the State of Montana

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Respondent.

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

DANIEL J. POPEO
PAUL D. KAMENAR
NICHOLAS E. CALIO
1612 K Street, N.W., Suite 502
Washington, D.C. 20006
(202) 857-0240
Attorneys for Amicus Curiae, Washington Legal Foundation

November 19, 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a death penalty imposed pursuant to a constitutional statute on the basis of a plurality of aggravating circumstances, each of which has been individually established beyond a reasonable doubt and stated in writing by the jury, must be set aside because one such circumstance is subsequently determined to be unconstitutional?

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IN THE

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WALTER ZANT, WARDEN,
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Respondent.

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF or Foundation) is a non-profit corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to matters raising criminal justice and related constitutional issues. The Foundation's concern for the physical, psychological, and financial impact crime has on its victims, their families, and society has led to the establishment of a Crime Victims Program.

This program is designed to advance the rights of crime victims and to help reduce the alarming crime rate in America. Among other activities, WLF provides educational materials, legal guidance, and assistance to the victims of violent crime, participates in rulemaking proceedings before agencies such as the United States Parole Commission, and monitors criminal cases in which the courts have been too lenient in sentencing violent criminals or otherwise exhibited an insensitivity to the rights of victims and the general public.

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the public by urging that this Court consider the right and the need of the States to protect their law-abiding citizens from murders and other acts of extreme violence. The Foundation believes that the States must be permitted without undue interference from Federal Courts to establish guidelines and carry out capital sentences within the meaning of the Eighth and Fourteenth Amendments of the Constitution. WLF is committed to insuring that the public interest arguments in favor of capital punishment are advanced before this Court as frequently as are those against it.

The Washington Legal Foundation has appeared before this Court as *amicus curiae* on numerous occasions. Briefs *amicus curiae* have been filed with and accepted by the Supreme Court in the following recent cases: *Eddings v. Oklahoma*, No. 80-5727, brief filed August 12, 1981); *Edwards v. United States*, No. 81-5017 (brief filed September 2, 1981); *Williams v. Zbaraz*, 448 U.S. 358, 100 S.Ct. 2694 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York*, 447 U.S. 530, 100 S.Ct. 2326 (1980); *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Carbon Fuels Company v. United Mine Workers*, 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 322 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 323 (1979); *Federal Trade Commission v. Standard*

Oil Co. of California, 449 U.S. 232, 101 S.Ct. 62 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, —— U.S. ——, 101 S.Ct. 1287 (1981); *Rostker v. Goldberg*, —— U.S. ——, 101 S.Ct. 2646 (1981); *Moody v. Forresster*, —— U.S. ——, 101 S.Ct. 1733 (1981); *First National Maintenance Corp v. NLRB*, —— U.S. ——, 101 S.Ct. 1510 (1981).

WLF can bring to this case a perspective not presently represented which may assist in obtaining full consideration of the public interest issues. While the Washington Legal Foundation appreciates the difficult nature of this Court's task in capital cases, the time has come to speak bluntly. Legislatures reflect the will of the public; juries embody the conscience of the community. Both have spoken on capital punishment. Too often, all that stands in the way of carrying out the common weal are the actions of various Federal courts. While this Court has not seen fit to abolish capital punishment, it has seen fit to sabotage its imposition by virtue of constant reinterpretation and refinement of the applicable principles. The resultant confusion undermines the rightful authority of the States to protect the general welfare and the confidence of the public in its government and criminal justice system.

STATEMENT OF THE CASE

Amicus Curiae, Washington Legal Foundation believes that the background to the instant case is best examined in two parts: the factual background leading to Petitioner's conviction and sentence and the procedural background leading Respondent to this Court. The purpose of this organizational framework is to highlight the points which are often lost in cases such as this, but which should be foremost in this Court's mind as it reaches its decision—the heinous nature of the crime committed, the right of law-abiding citizens to be protected by their government, and the myriad procedural protections already afforded the criminal.

A. *Factual Background of Conviction and Sentence*

Respondent, Alpha Otis O'Daniel Stephens, was convicted of murder and sentenced to death by a jury of the State of Georgia for the 1974 murder of Mr. Roy Asbell. One year prior to murdering Roy Asbell, Respondent had committed a murder, an armed robbery, and four burglaries. He escaped from the Houston County, Georgia jail on August 19, 1974, where he was serving concurrent sentences for the multiple burglary convictions.

Respondent had already committed an armed robbery and a burglary after his escape when he broke into the home of Charles Asbell on August 21, 1974. Respondent located a .357 magnum pistol inside the house which he loaded and placed, along with various other weapons, in a 1972 Dodge he had stolen.

Charles Asbell was not at home at the time of the break-in. However, Charles Asbell's father, Roy, drove up to his son's house as Respondent was preparing to leave the scene of the burglary. Roy Asbell asked Stephens what he had been doing in the house. After seeing the guns in Stephens' car, Roy Asbell pulled out a derringer. Respondent, who is 6 feet, 2 inches tall, ran to Roy Asbell's truck, dragged him out at gunpoint, and hit him in the face several times. Roy Asbell, who was 5 feet, 6 inches tall and crippled as a result of a tractor accident at the time, begged petitioner not to hit him any more. Mr. Asbell, who usually carried several hundred dollars, offered Stephens money in exchange for his life. Respondent took Roy Asbell's money and kicked and pistol-whipped him again causing a broken jaw and several skull fractures.

Stephens commandeered Roy Asbell's truck and drove him three miles to a pasture where Respondent stopped the truck. Roy Asbell tried to escape with his life by hobbling across the field to an abandoned building being

used as a barn. Respondent chased him, however, and after taking more money from Roy Asbell, Respondent placed the .357 magnum in his ear and fired twice. Both bullets passed through Mr. Asbell's skull and blew off the top of his head. Stephens had finally killed him.

The murderer was apprehended the next day and was eventually convicted of murder, among other crimes, and sentenced to die under the Georgia capital statute previously adjudged constitutional by this Court. *Gregg v. Georgia*, 428 U.S. 153 (1976).

B. *Procedural Background*

At trial, the judge permitted the jury to consider four statutory aggravating circumstances:

(1) Respondent had a prior record of conviction for a capital felony, Ga. Code Ann. 27-2534.1(b)(1);

(2) Respondent had a substantial history of *serious assaultive convictions*, Ga. Code Ann. § 27-2534.1 (b)(1);

(3) Respondent was on escape when he committed the murder, Ga. Code Ann. § 27-2534.1(b)(9); and

(4) the offense was outrageously or wantonly vile, horrible or inhuman, Ga. Code Ann. § 27-2534.1 (b)(7).

The jury determined that the first three aggravating circumstances were individually supported by the evidence. However, it determined that the evidence did not support the existence of the fourth specified circumstance beyond a reasonable doubt. *Stephens v. Zant*, 631 F. 2d 397, 405 (5th Cir. 1980).

Stephens appealed his conviction and sentence directly to the Georgia Supreme Court. Before his appeal was final, the Georgia Supreme Court held that the portion of Ga. Code Ann. § 27-2534.1(b)(1), which allows the

death penalty where "a murder is committed by a person with a substantial history of assaultive convictions," was unconstitutional. *Arnold v. State*, 236 Ga. 534, 542, 224, S.E. 2d 386 (1976). Nevertheless, the Georgia Supreme Court upheld Respondent's death penalty because the evidence supported the jury's findings of the other two aggravating circumstances. *Stephens v. State*, 237 Ga. 259, 261-62, 227 S.E. 2d 261, 263 (1976). This Court denied Stephens' petition for certiorari. *Stephens v. State* 429 U.S. 986 (1976).

The murderer filed a State habeas corpus petition and again alleged that jury's consideration of an aggravating circumstance later held to be unconstitutional required overturning his sentence. The Georgia Supreme Court again upheld Respondent's sentence, *Stephens v. Hopper*, 241 Ga. 596, 603-04, 247 S.E. 2d 92 (1978), and this Court again denied Respondent's subsequent petition for writ of certiorari. 439 U.S. 991 (1978).

Respondent began his case anew with a writ of habeas corpus to the Federal District Court alleging the same constitutional flaw he had already litigated and lost in his State appeal and habeas corpus proceeding. The District Court of the Middle District of Georgia denied Federal habeas corpus relief. *Stephens v. Zant*, 79-30-MAC (M.D. Ga. May 11, 1979). However, Roy Asbell's murderer finally found a willing ear on his seventh try when the Fifth Circuit Court of Appeals vacated his death sentence. *Stephens v. Zant*, 631 F. 2d 397 (5th Cir. 1980).

This Court granted certiorari limited to a single question: "[w]hen the death sentence is imposed on basis of plurality of aggravating circumstances, each of which has been established beyond reasonable doubt, must death sentence be set aside because one aggravating circumstance is set aside?" 50 U.S.L.W. 3212 (October 6, 1981).

SUMMARY OF ARGUMENT

Respondent's argument that his death sentence is unconstitutional simply because one of a plurality of aggravating circumstances found by the jury was subsequently set aside lacks merit. Respondent's death sentence was imposed pursuant to a constitutional statute which provides that the presence of a single aggravating circumstance justifies the imposition of a capital sentence. In Respondent's case, the jury found that three such circumstances were independently supported beyond a reasonable doubt by the evidence. Moreover, the record of the instant case provides this Court positive evidence by which to determine the specific grounds for the jury's verdict. The same record demonstrates that the sentence imposed by the jury resulted from a clearly-channeled, rationally reviewable exercise of discretion. Hence, the ruling of the Fifth Circuit Court of Appeals must be reversed.

Public policy considerations also dictate that Respondent's sentence be reinstated by this Court. Through the legislatures which reflect its will and the juries which reflect its conscience, society has mandated that capital punishment be imposed for a certain class of crimes by which it is particularly revulsed. The persistent, *ex cathedra* interference of an all-knowing, over-arching Federal judiciary which constantly expands and tinkers with the procedural protections afforded to capital defendants interferes with the right of the States to protect their citizens and frustrates the ends of justice. Hence, the public interest requires that the State of Georgia be permitted to punish Respondent Stephens for the brutal murder of Roy Asbell.

ARGUMENT

I. THIS COURT NEED NOT SET ASIDE A DEATH PENALTY IMPOSED PURSUANT TO A CONSTITUTIONAL STATUTE ON THE BASIS OF A PLURALITY OF AGGRAVATING CIRCUMSTANCES SOLELY BECAUSE ONE SUCH CIRCUMSTANCE IS SUBSEQUENTLY FOUND TO BE UNCONSTITUTIONAL.

The Fifth Circuit Court of Appeals erroneously overturned the death penalty of Respondent Alpha Otis O'Daniel Stephens. Stephens' death sentence was imposed pursuant to a constitutional statute on the basis of a plurality of aggravating circumstances, each of which was individually determined to exist beyond a reasonable doubt. Hence, the murderer's sentence need not be declared unconstitutional simply because one such circumstance was subsequently set aside. The cases relied upon by the United States Court of Appeals for the Fifth Circuit in reaching its decision are distinguishable in fact and principle from the one at bar. The record in Respondent's case provides this Court positive evidence by which to determine the specific grounds for the jury's decision. In addition, the jury's decision to impose a capital sentence resulted from a rationally reviewable, clearly-channeled exercise of discretion which starkly contrasts to the wandering, speculative exercise of judicial review by the Fifth Circuit. Therefore, the Washington Legal Foundation submits that this Court must reverse the ruling of the Court below and reinstate the verdict of the Georgia jury against Respondent.

A. The Jury's Decision to Impose a Capital Penalty in the Instant Case, Explicitly Based as it Is on Several Aggravating Circumstances Individually Established Beyond a Reasonable Doubt, Passes Constitutional Muster.

The jury's imposition of the death sentence on Respondent Stephens does not violate his constitutional rights. While one of the statutory aggravating circum-

stances found by the jury was later deemed unconstitutional, the Supreme Court of Georgia has repeatedly held that a death penalty imposed on the basis of a plurality of aggravating circumstances will not be set aside merely because one of the aggravating circumstances is later deemed infirm. *Stevens v. State*, 247 Ga. 698, 278 S.E. 2d 398 (1981), *cert. denied*, 449 U.S. 891 (1981); *Hamilton v. State*, 246 Ga. 264 n. 1, 271 S.E. 2d 173 (1980), *cert. denied*, —— U.S. —— (1981); *Brooks v. State*, 246 Ga. 262, 263, 271 S.E. 2d 172 (1980), *cert. denied*, —— U.S. —— (1980); *Burger v. State*, 245 Ga. 458, 460-61, 265 S.E. 2d 797 (1980), *cert. denied*, 446 U.S. 988 (1980); *Gates v. State*, 244 Ga. 587, 599, 261 S.E. 2d 349 (1979), *cert. denied*, 445 U.S. 938 (1980); *Stephens v. Hopper*, 241 Ga. 596, 603-04, 247 S.E. 2d 92 (1978), *cert. denied*, 439 U.S. 991 (1978); *Stephens v. State*, 237 Ga. 259, 261-62, 227 S.E. 2d 261 (1976), *cert. denied*, 429 U.S. 986 (1977).* Rather, the Georgia Court has determined that the existence of other independently supported aggravating circumstances justifies affirmance of a capital sentence and at least two members of this court have indicated agreement with that position. *See Westbrook v. Balkcom*, —— U.S. ——, 101 S. Ct. 541, 543, 66 L. Ed. 2d. 298 (1980) (Stevens, J., concurring in denial of certiorari); *Id.* at 66 L. Ed 2d 299 (White, J., dissenting from denial of certiorari).

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* A number of other State courts have reached a similar conclusion. *See State v. Monroe*, 397 So. 2d 1258, 1274-76 (La. 1981); *State v. Sonnier*, —— So. 2d —— (La. 1981) (#81-K-1846); *State v. Clark*, 126 Ariz. 428, 616 P. 2d 888, 895-97 (Ariz. banc 1980), *cert. denied*, 449 U.S. 1067 (1980); *State v. Rust*, 197 Neb. 528, 250 N.W. 2d 867, 872-76 (1977), *cert. denied*, 434 U.S. 912 (1977); *State v. Mercer*, 618 S.W. 2d 1, 10 (Mo. banc 1981), *cert. denied*, —— U.S. ——, 51 U.S.L.W. 3279 (Oct. 13, 1981); *Brown v. State*, 381 So. 2d 690, 696 (Fla. 1980), *cert. denied*, 449 U.S. 1118 (1981); *Contra., Bufford v. State*, 283 So. 2d 1162, 1174 (Ala. Ct. Crim. App. 1980); *Hopkinson v. State*, 632 P. 2d 79, 171-72 (Wyo. 1981).

Similarly, no decision of this Court advanced by Respondent requires that his sentence be vacated. While the Fifth Circuit admitted in the face of the well-settled Georgia law that "no uncertainty" existed as to the two valid aggravating circumstances and either "by itself would be legally sufficient to permit the jury to impose the death penalty," *Stephens v. Zant*, 631 F. 2d 397, 406 (5th Cir. 1980), the court nevertheless vacated Stephens' sentence. In reaching its remarkable decision, the court relied primarily on the authority of *Stromberg v. California*, 283 U.S. 359 (1931); *accord*, *Bachellar v. Maryland*, 397 U.S. 564 (1970); *Street v. New York*, 394 U.S. 576 (1969); *Yates v. United States*, 354 U.S. 298 (1957), and on the generalized pronouncements of principle by this Court in previous capital cases. *Furman v. Georgia*, 408 U.S. 238 (1972); *Woodson v. North Carolina*, 428 U.S. 280 (1972) (opinion of Stewart, Powell and Stevens, JJ); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Gardner v. Florida*, 430 U.S. 349 (1977). However, an examination of the lower court's opinion and the cases cited therein demonstrates that the Fifth Circuit misinterpreted case law and speculated on the jury's thought processes at the expense of a wealth of objective evidence supporting the constitutionality of Stephens' sentence, as well as at the expense of the public interest.

Even a superficial examination of *Stromberg* and its progeny, all of which dealt with general verdicts of guilty on multicount indictments, highlights their factual and substantive differences from the case at bar. In *Stromberg*, *supra*, the defendant was convicted by a jury under a California statute which made it an offense to publicly display a red flag for any one of three purposes. This Court ruled that punishing an individual for the first named purpose would be unconstitutional and rejected the State court's reasoning that the conviction could be sustained because the other two statutory grounds were severable and constitutional. The Court stated that:

> The verdict against the appellant was a general one. It did not specify the ground upon which it rested . . . . [I]t is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses . . . was invalid, it cannot be determined upon this record that the appellant was not convicted under the [unconstitutional] clause. 283 U.S. at 367-68.

Accord, Bachellar, supra, at 570-71; *Street, supra,* at 585-88; *Yates, supra,* at 311-12. *See also, Williams v. North Carolina,* 317 U.S. 287 (1942).

Whatever force the *Stromberg* principle has in the context of the instant case derives solely from its generality. This Court has stated in reference to situations similar to the one at bar that:

> There is no comparable hazard when the indictment or information is in several counts and the conviction is explicitly declared to rest on findings of guilt on certain of those counts, for in such instances there is positive evidence that the trier of fact considered each count on its own merits and separately from the others. *Street v. New York,* 394 U.S. at 588 (footnote omitted).

Here, the penalty verdict from Respondent's sentencing trial is not a general verdict of guilt or innocence like that at issue in *Stromberg;* it is a specialized sentencing verdict which states that a number of aggravating circumstances independently existed in Respondent's murder of Roy Asbell. *See Westbrook v. Balkcom, supra,* 66 L.Ed.2d at 299 (White, J., concurring in denial of certiorari). A closer comparison of *Stromberg* and the case at bar underscores the differences.

The *Stromberg* jury was told that if defendant committed any one of three acts, he could be found guilty. The jury's verdict in that case stated no more than that defendant was guilty—a verdict which made it impossible to discern the act or acts upon which it was based. In the instant case, however, Stephens' guilt had already

been determined and the jury was instructed for sentencing purposes to consider, *inter alia*, the existence of four disjunctively stated aggravating circumstances. These aggravating circumstances were provided to the jury both orally and in writing with instructions that if sentencing was fixed at death the jury must:

> . . . designate in writing . . . the aggravating circumstances or circumstance which you found to have been proven beyond a reasonable doubt. Unless one or more of these statutory aggravating circumstances are proven beyond a reasonable doubt you will not be authorized to fix punishment at death. If you fix punishment at death . . . you would recite in the exact words which I have given you the one or more circumstances you found to be proven beyond a reasonable doubt.

Unlike the *Stromberg* jury, the triers of fact below did not simply provide a general sentencing verdict of death. Rather, it specified in writing the existence, beyond a reasonable doubt, of no less than three aggravating circumstances, any of which is sufficient standing alone to justify Respondent's sentence. The jury's rejection of the fourth aggravating circumstance alleged by the State of Georgia buttresses the conclusion that it considered and decided each circumstance separately. Thus, the principle announced in *Stromberg* and related cases is without constitutional effect here and the subsequent determination that one of the plurality of aggravating circumstances was constitutionally infirm does not affect the validity of Stephens' sentence.

B. Respondent's Death Sentence Resulted From a Clearly-Channeled, Rationally Reviewable Exercise of Discretion by the Jury Which Cannot Be Overturned on the Basis of Speculation by the Fifth Circuit.

The Court of Appeals also erred in holding that:

> The jury's discretion here was not sufficiently channeled . . . , and that the process in which the death

> penalty was imposed in this case was not "rationally reviewable." *Stephens*, 631 F.2d at 406. (citations omitted).

In the years since *Furman v. Georgia*, *supra*, this Court has largely focused its efforts and, as a result, those of the States on channeling the jury's discretion in order to insure rational, consistent sentencing in capital cases. *See, e.g., Gregg, supra*, 428 U.S. at 188-89; *Woodson, supra*, 428 U.S. at 304; *Lockett v. Ohio*, 438 U.S. 586, 601 (1978); *Jurek v. Texas*, 428 U.S. 262, 276 (1978). No question exists that all of the procedural requirements mandated by this Court's previous decisions were met in the instant case. Thus, it is particularly troubling that the Fifth Circuit Court of Appeals chose to usurp the function of the Georgia jury and speculate in hindsight on the nature and path of the jury's deliberations.

According to the procedures embodied in Georgia's capital punishment statute, Respondent's jury was instructed to consider all facts presented in extenuation and mitigation of his crime. The jury was also instructed that it could consider the existence of four statutory aggravating circumstances; that it had to find in writing "one or more" of those circumstances existed "beyond a reasonable doubt" or punishment could not be fixed at death; and that a recommendation of mercy would result in life imprisonment.

The jury specified in writing that three statutory aggravating circumstances existed beyond a reasonable doubt and that a fourth did not. *Amicus* submits that the very exercise of stating in writing the existence of independent aggravating circumstances drains all color from Respondent's argument and the Fifth Circuit's holding.

Following the jury's decision, the Georgia Supreme Court considered as part of its statutorily mandated review whether Stephens' sentence was influenced by passion, prejudice, or any other arbitrary factor. The court

also considered whether the evidence supported the finding of three statutory aggravating circumstances. The Georgia Supreme Court affirmed Respondent's sentence based upon all the evidence at trial. That evidence, which is undisputed, shows that Respondent was on escape at the time he brtually murdered Roy Asbell, see Ga. Code Ann. § 27-2534.1(b)(1), and that he had five capital felony convictions before he was convicted of the murder of Roy Asbell, see Ga. Code Ann. § 27-2534.1(b)(9). Either finding justifies the jury's verdict. Thus, the record in the instant case presents positive evidence by which this Court can pinpoint, as did every other court reviewing Respondent's case but the Fifth Circuit, the constitutionally valid grounds upon which the jury imposed its sentence.

The conclusion that the Fifth Circuit's decision must be reversed is reinforced by a brief examination of the lower court's reasoning. Originally, the Court of Appeals predicated its ruling that the sentencing process was not "rationally reviewable" on the ground that "[t]he presence of the unconstitutionally vague circumstance also made it possible for the jury to consider several prior convictions of petitioner which otherwise would not have been before it." *Stephens v. Zant*, *supra*, 631 F.2d at 406. However, the ground of decision is clearly erroneous. Georgia law expressly provides that any prior criminal convictions, or lack of the same, are admissible in evidence at the sentencing hearing. *See Ga. Code Ann.* § 27-2503(a); *see also*, *Stephens v. Hopper*, *supra*, 247 S.E.2d 829 (1977). Thus, the Fifth Circuit's speculation on the effects of these prior convictions, which was tenuous and misdirected to begin with, becomes meaningless in light of the applicable State law.

The lower court's response to an explication of Georgia law in the State's motion for rehearing is similarly unacceptable. In its modified opinion, the court merely

refines its rationale and contends, without any citation to legal authority, that the presence of the vague aggravating circumstance "may have unduly directed the jury's attention to [Respondent's] prior convictions." *Stephens v. Zant*, 648 F.2d 446 (5th Cir. 1981). With all due respect, the Court of Appeals' conjectural musings on the thought processes of the jury far exceed any legitimate scope of review. It is not the role of judges to divine how a jury may have been influenced when all objective evidence indicates that it made a reasoned, cautious decision. As previously noted, Stephens' jury exercised its discretion in a clearly-channeled manner and the entire review process comported with the constitutional mandates of this Court. Therefore, the Washington Legal Foundation submits that the isolated statement of constitutional principles and speculation of the Fifth Circuit Court of Appeals cannot be allowed to undermine that process.

II. PUBLIC INTEREST CONSIDERATIONS DICTATE THAT THIS COURT REINSTATE THE DEATH PENALTY FOR ROY ASBELL'S MURDERER.

Amicus curiae Washington Legal Foundation submits that sound public interest considerations dictate the reinstatement of Respondent's death penalty for the brutal murder of Roy Asbell. While few, if any, members of our society view the imposition of the death penalty lightly, this Court has recognized that "the death penalty has been employed throughout our history." *Trop v. Dulles*, 356 U.S. 86, 99 (1958). This Court has also acknowledged that ". . . in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people," *Furman, supra*, 408 U.S. at 383 (Burger, C.J., dissenting), or, stated somewhat differently, that "the value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with

the legislatures. . . ." *Gregg, supra*, 428 U.S. at 186-87. Moreover, this Court has also recognized that juries "express the conscience of the community on the ultimate question of life and death," *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968), and that "[t]he States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision . . . ." *McGautha v. California*, 402 U.S. 209 (1971).

With that predicate in mind, it is particularly telling that society, through the legislatures and juries that represent it, has spoken very clearly on capital punishment. Over 35 States have enacted death penalty statutes since this Court's decision in *Furman*. *See Eddings v. Oklahoma*, 616 P.2d 1159, 1167 (Okla. Cr. App. 1978); *Coleman, supra*, 68 L.Ed.2d at 339. Similarly, public opinion surveys demonstrate society's support for capital punishment. In 1966, a poll found that 42 percent of those polled favored capital punishment while 11 percent had no opinion and 47 percent opposed it. A 1969 poll, however, indicated 51 percent in favor, 9 percent with no opinion, and 40 percent opposed. Erskine, *The Polls: Capital Punishment*, 34 Public Opinion Quarterly 290 (1970). By 1973, 59 percent favored the death penalty with 31 percent opposed, while by 1977, 67 percent were in favor and only 25 percent opposed. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS at 199 (1980). This year a *Time* magazine poll indicated that 73 percent of the American public supported the imposition of the death penalty. *Time*, June 1, 1981 at 13, col. 3. The public support of capital punishment is clearly a function of the alarming crime rate in this country and a strong desire for punishment, deterrence, and retribution. While the public supports capital punishment and juries are

imposing death sentences with increasing frequency, their verdicts are rarely carried out. Since capital punishment was legalized again in 1976, 891 murderers were sent to death row; only four have been executed. *Newsweek*, November 16, 1981 at 102, col. 1.

The reasons are not hard to find. This Court once stated that:

> Our function is not to impose on the States, *ex cathedra*, what might seem to us a better system for dealing with capital cases. *McGautha, supra*, at 195.

However, an examination on this Court's capital punishment decisions over the last decade illustrates that, in effect, it has imposed a constantly changing "better system" on the States.

McGautha, the last death penalty case decided by a majority of the Court, held that the Constitution did not "guarantee trial procedures that are the best of all worlds." 402 U.S. at 221. Little more than a year later, however, this Court began to speak with many voices in the Babelesque *Furman* decision which initiated the search for the "perfect" system. *Furman* sowed legislative and judicial confusion which *Gregg, supra*, and its companion cases attempted to rectify four years later.

The *Gregg* line of cases did not end the process, however. In the five years since those decisions, this Court has repeatedly modified its views on the constitutional requirements for imposing capital punishment. *See Coker v. Georgia*, 433 U.S. 584 (1977); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Green v. Georgia*, 442 U.S. 95 (1979); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Beck v. Alabama*, 447 U.S. 625 (1980); *Estelle v. Smith*, —— U.S. ——, 101 S. Ct. 1866, 68 L.Ed.2d 359 (1981); *Bullington v. Missouri*, —— U.S. ——, 101 S. Ct. 1852, 68 L.Ed.2d 270 (1981). This "[constant] tinkering with the principles laid down in the five death penalty cases

decided in 1976," has wrapped a veil of "due process" over an ever-expanding list of capital sentencing procedure issues. *Coleman, supra,* 68 L.Ed.2d at 339 (Rehnquist, dissenting from denial of certiorari). These decisions have led one member of this Court to question whether "we have mistakenly sent a signal to the lower state and federal courts that the actual imposition of the death sentence is to be avoided at all costs." *Id.* Indeed, one lower court judge has wondered whether "the Court is in the process of hedging this penalty about with such obstacles that, as a practical matter, it cannot be carried out." *Gibson v. Jackson,* 578 F.2d 1045, 1057 (5th Cir. 1978) (Gee, Circuit Judge, specially concurring).

The repeated statements that capital punishment is constitutional have begun to have a hollow ring as a practical matter. While the inmate population on death row continues to rise as a result of jury determinations that a restricted number of crimes must be punished by death, few executions are ever carried out and none are conducted within a reasonable time.

Amicus submits that we cannot continue to steep capital defendants in unduly expansive procedural protections. At some point, it must be acknowledged that the tortuous procedural path of capital cases does more to *undermine* the criminal justice system and society's confidence in it than it does to protect the rights of those who have killed fellow human beings. *Amicus* does not object to reasonable procedural protections in our criminal justice system. However, the Washington Legal Foundation does question the efficacy and necessity of the long list of protections now afforded to capital defendants.

A murderer may effectively challenge and re-challenge his death sentence on the same grounds again and again. As stated recently: "They can make these appeals in two

state courts and, starting fresh, through the Federal system up to the Supreme Court." *Newsweek*, "The Mistress of Delay," November 16, 1981 at 102-03. Respondent Stephens' case is a typical example. His conviction and sentence were reviewed and affirmed by the Georgia Supreme Court. This Court denied certiorari. His State *habeas corpus* petition was reviewed and denied by the high court in Georgia and certiorari was denied by this Court. The Federal District Court denied his Federal *habeas corpus* petition until finally, in his seventh "bite at the apple" Respondent found a "court willing to vacate his death sentence because in its view his trial or sentence was not free from constitutional error." *Coleman, supra*, 68 L.Ed.2d at 338.

The Washington Legal Foundation believes that "the [respondent has] had fair trial and fair review. The people of the State are also entitled to due process of law." *Stein v. New York*, 346 U.S. 156, 197 (1953). The State of Georgia, and the other States, must be allowed to effect the punishment and deterrence of crime as they see fit within the meaning of this Court's previous decisions. For those who argue that the imposition of the death penalty has not been an effective deterrent, *amicus* submits that if that is so, it is because of the continued delays in carrying out the sentence that has weakened its deterrent effect. As it now stands, the criminal element can laugh at the death penalty knowing that a sympathetic judge will invariably be found to thwart the will of the people. This Court must finally put a stop to the mockery made in recent years of society's right to express its revulsion for particular crimes through its criminal justice system. *Amicus* submits that this Court cannot allow justice to be frustrated again. The time has come for this Court to signal that law-abiding members of society, as well as criminals, have rights which deserve protection.

CONCLUSION

The essence of the United States constitutional plan is to recognize that sovereign power is divided between a Federal Government and State Governments and that the definition, detection, and prosecution of crime is primarily a matter of local concern. The Washington Legal Foundation submits that the sentencing of Respondent was a matter of local concern carried out well within the strictures of the Federal Constitution. The State of Georgia has the right on behalf of its citizens to administer that sentence without the continued interference from an overreaching Federal Judiciary.

Respectfully submitted,

DANIEL J. POPEO
General Counsel

PAUL D. KAMENAR
Director of Litigation

NICHOLAS E. CALIO
Litigation Counsel

WASHINGTON LEGAL FOUNDATION
1612 K Street, N.W., Suite 502
Washington, D.C. 20006
(202) 857-0240

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